

2725

No. 13246

United States
Court of Appeals
For the Ninth Circuit.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation,

Appellant,

vs.

JOSEPH J. SEAMAS,

Appellee.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
Southern Division.

FILED

APR 15 1952

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amended Complaint	13
Answer	7
Appeal:	
Certificate of Clerk to Record on	381
Notice of	21
Notice of Bond Having Been Filed on ...	24
Certificate of Clerk to Record on Appeal	381
Complaint	3
Demand for Jury Trial	9
Designation of Contents of Record to Be Cer- tified to the Court of Appeals	27
Designation of Record to Be Printed	384
Judgment on Verdict	16
Motion for New Trial	17
Names and Addresses of Attorneys	1
Notice of Appeal	21
Notice of Bond Having Been Filed on Appeal	24
Notice of Motion and Motion to Amend	9
Affidavit of Chris Papas	10

	INDEX	PAGE
Order Denying Motion for New Trial		20
Order Granting Plaintiff Leave to Amend His Complaint		12
Order Granting Stay of Execution		20
Praecipe for Transcript of Record		25
Reporter's Transcript		28
Instructions to the Jury		353
Witnesses, Defendant's:		
Luckey, Dr. C. A.		
—direct		238
—cross		255, 260
—redirect		268
—recross		269
Mahan, L. E.		
—direct		282
—cross		294
—redirect		307, 317
—recross		313, 331
Marrs, Bond H.		
—direct		271
—cross		272
Wilson, Neil		
—direct		273, 334
—cross		277, 342

INDEX

PAGE

Witnesses, Plaintiff's:

McCloy, Dr. Neil P.

—direct	183
—cross	208
—redirect	226

Seamas, Joseph John

—direct	29, 41
—cross	80, 93
—redirect	118
—recross	125, 127

Strain, Milton G.

—direct	149
—cross	172
—redirect	179
—recross	181

Weith, Sidney Albert

—direct	129
—cross	136, 143
—redirect	146
—recross	149

Rule 820	14
----------------	----

Statement of Points	383
---------------------------	-----

Supersedeas Bond	21
------------------------	----

Verdict	15
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NAMES AND ADDRESSES OF ATTORNEYS

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JOSEPH D. MICHAEL, ESQ.,

CHRIS PAPAS, ESQ.,

MICHAEL AND PAPAS,

515 Bank of America Building,
Stockton, California,

Attorneys for Appellee.

In the District Court of the United States, Northern
District of California, Southern Division

No. 30360

JOSEPH J. SEAMAS,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation,

Defendant.

COMPLAINT FOR PERSONAL INJURIES

Plaintiff complains of defendant and for cause of
action alleges:

I.

That at all times herein mentioned defendant was
and now is a corporation organized and existing
under and by virtue of the laws of the State of
Kansas and doing business in the State of California,
and other states, and that said defendant was at all
times herein mentioned and now is engaged in the
business of a common carrier by railroad in inter-
state commerce in said State of California and other
states.

II.

That at all times herein mentioned, defendant
was a common carrier by railroad engaged in in-
terstate commerce and plaintiff was employed by
defendant in such interstate commerce, and the
injuries to plaintiff, hereinafter complained of,
arose in the course of and while plaintiff and de-

defendant were engaged in the conduct of such interstate commerce.

III.

That this action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51, et seq.

IV.

That on or about the 9th day of December, 1950, at or about the hour of 10:00 o'clock p.m. of said day, plaintiff was regularly employed by defendant as a "field man," working on and about defendants' Mormon Yard in the City of Stockton, County of San Joaquin, State of California.

V.

That at said time and place and while acting in the regular course and scope of his duties as such employee, plaintiff was required to and he was engaged in operating the hand brake on a railroad box car on and about the aforesaid Mormon Yard of defendant; that at said time and place defendant owed plaintiff the duty of exercising ordinary care in providing him with a safe place for the performance of the duties of his said employment; that at said time and place defendant, its servants, agents and employees, carelessly and negligently gave certain signals in connection with the movement of defendants' railroad cars; that at said time and place defendant, its servants, agents and employees, carelessly and negligently moved a certain locomotive and railroad box cars; that as a direct

and proximate result of said carelessness and negligence of defendant, its servants, agents and employees as aforesaid, and while plaintiff was attempting to operate said hand brake, he was thrown from said railroad box car with great force and violence and sustained the injuries to his person hereinafter set forth.

VI.

That by reason of the carelessness and negligence of or defendant, its servants, agents and employees and as a direct and proximate result thereof, plaintiff was rendered sick, sore, lame, disabled and disordered, both internally and externally, and received the following personal injuries: Injury to his spine, injury to his back, injury to both legs and other parts of his body and suffered extreme and intense plain and severe shock to his nervous system.

VII.

That at the time of the happening of the accident, plaintiff was a strong and able-bodied man capable of earning, and he was earning, the sum of approximately \$400.00 per month; that by reason of the facts herein alleged plaintiff is and he will be for an indefinite period of time in the future, rendered incapable of performing his usual work or services, all to plaintiff's damage in an amount as yet unascertainable, and that when said sum is ascertained plaintiff will pray leave of Court to insert said sum as the reasonable value of said loss of services.

VIII.

That by reason of the carelessness and negligence of the defendant, its servants, agents and employees, and as a result thereof, the plaintiff was hospitalized and did secure the services of nurses, physicians and surgeons, and said plaintiff has had medicines, medical bandages and appliances, for which plaintiff will be compelled to incur an indebtedness, the amount of which is not now known and plaintiff prays leave of this Court to insert herein the amount of such indebtedness when it is ascertained.

IX.

That as a direct and proximate result of the carelessness and negligence of defendant, its servants, agents and employees, as aforesaid, plaintiff has been generally damaged in the sum of Seventy-five Thousand (\$75,000.00) Dollars.

Wherefore, plaintiff prays judgment against defendant in the sum of Seventy-five Thousand (\$75,000.00) Dollars, together with the special damages as may be hereafter ascertained, and for his costs of suit incurred herein.

MICHAEL AND PAPAS,

By /s/ JOSEPH MICHAEL,

Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed Feb. 16, 1951.

[Title of District Court and Cause.]

ANSWER

Comes Now defendant and for its answer to the Complaint on file herein Admits, Denies and Alleges as follows:

I.

Answering Paragraphs V, VI, VII, VIII and IX, Denies each and every allegation contained in said paragraphs. Further answering Paragraph VII, Alleges that upon any trial hereof it will produce its records which will accurately reflect the amount plaintiff was earning and the amount he was capable of earning for the period preceding his injury; and Denies that plaintiff has been injured or damaged in any sum or at all by reason of any negligence of defendant.

Wherefore, etc.

First Affirmative Defense

I.

Defendant Alleges that if plaintiff suffered any injuries or damages at the time and place referred to in the Complaint plaintiff's own negligence caused and contributed to said injuries or damages.

Wherefore, etc.

Second Affirmative Defense

I.

Defendant Alleges that at the time and place referred to in the Complaint if plaintiff suffered any

injuries or damages they were solely caused by plaintiff's own negligence.

Wherefore, etc.

Third Affirmative Defense

I.

Defendant Alleges that at the time and place set forth in the Complaint any injuries or damages suffered by plaintiff were proximately caused by and were the result of an unavoidable accident and not proximately caused or contributed to by any negligence of the defendant.

Wherefore, defendant prays judgment that plaintiff take nothing by reason of his Complaint on file herein; that defendant be awarded its costs and disbursements herein incurred and expended, and for such other and further relief as to the Court may seem just and proper in the premises.

ROBERT W. WALKER,

J. H. CUMMINS,

By /s/ J. H. CUMMINS,

Attorneys for Defendant.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 8, 1951.

[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL

Plaintiff above named hereby demands a trial by jury of the above-entitled action.

Dated May 10, 1951.

MICHAEL AND PAPAS,

By /s/ CHRIS PAPAS,

Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 11, 1951.

[Title of District Court and Cause.]

NOTICE OF MOTION AND
MOTION TO AMEND

To Defendant Above Named and to Messrs. Robert W. Walker and J. H. Cummins, Its Attorneys:

You Are Hereby Notified that on the 9th day of July, 1951, at the hour of ten o'clock a.m., in the courtroom of the Honorable Edward P. Murphy, Judge of the United States District Court, Room 307, located in the United States Post Office and Courthouse Building, 7th and Mission Streets, in the City and County of San Francisco, State of California, plaintiff will move the Court to amend his complaint in the manner so that paragraph IX of said Complaint and the prayer thereof will be

amended to ask for \$150,000.00 general damages instead of the present \$75,000.00 general damages alleged in said paragraph IX and asked in the prayer of said complaint.

Said motion will be made upon all the papers and files herein and the affidavit filed herewith.

Dated this 30th day of June, 1951.

MICHAEL AND PAPAS,

By /s/ CHRIS PAPAS,

Attorneys for Plaintiff.

[Title of District Court and Cause.]

AFFIDAVIT OF CHRIS PAPAS

State of California,
County of San Joaquin—ss.

Chris Papas, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff herein; that since the original complaint was filed herein it has been determined that the injuries to plaintiff, Joseph J. Seamas, are much more serious than first indicated; that Joseph J. Seamas had definite nerve findings; that he has marked hypertrophic changes appearing at his lumbosacral spine, which has driven the spinous process of sacrum one against the first sacral root; that he has marked pain on extension and does not have the normal reflexes; that plaintiff will be handicapped in indus-

try for the rest of his life; that plaintiff may require further medical care and hospitalization.

Deponent further sayeth that upon the medical reports and advice of doctors who examined plaintiff in the month of March, 1951, plaintiff was much more seriously injured than was originally anticipated and the prognosis is that plaintiff will suffer pain for an indefinite length of time;

That a man disabled as severely as plaintiff now appears to be disabled should have an evaluation of his injuries much in excess of \$75,000.00, the original evaluation;

Wherefore, your deponent, in behalf of and for plaintiff, prays that the complaint heretofore filed and served be amended in the regard that general damages be assessed at \$150,000.00, and the prayer accordingly.

/s/ CHRIS PAPAS.

Subscribed and sworn to before me this 28th day of June, 1951.

[Seal] /s/ JEANNINE CATTRONE,
Notary Public in and for the County of San Joaquin, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 2, 1951.

[Title of District Court and Cause.]

ORDER GRANTING PLAINTIFF LEAVE TO
AMEND HIS COMPLAINT

The motion of plaintiff for an order requesting leave of Court to allow amendment to his Complaint, having come on regularly for hearing and having been submitted for decision;

It Is Hereby Ordered that said motion be and the same is hereby granted as follows:

It is ordered that plaintiff be granted leave to amend his Complaint in the following manner:

“Comes now plaintiff above named, and as and for his amended complaint, incorporates, each and every, all and singular, generally and specifically, the allegations in plaintiff’s first complaint served and filed herein, excepting that he amends the allegation of general damages contained in Paragraph IX and prayer of said complaint to the sum of One Hundred Fifty Thousand Dollars (\$150,000.00).”

Done in open Court this 9th day of July, 1951.

/s/ EDWARD P. MURPHY,
Judge of the U. S. District
Court.

[Endorsed]: Filed July 9, 1951.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes now plaintiff above named, and as and for his amended complaint, incorporates each and every, all and singular, generally and specifically, the allegations in plaintiff's first complaint served and filed herein, excepting that he amends the allegation of general damages contained in Paragraph IX and the prayer of said complaint to the sum of One Hundred Fifty Thousand Dollars (\$150,000.00).

Wherefore, plaintiff prays accordingly.

MICHAEL AND PAPAS,

By /s/ CHRIS PAPAS,

Attorneys for Plaintiff.

[Endorsed]: Filed July 24, 1951.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes Now defendant and for its answer to the Amended Complaint on file herein states as follows:

I.

Defendant incorporates its answer to the original Complaint by this reference.

II.

Defendant denies that plaintiff was damaged in the sum of \$150,000.00 or in any sum or at all by

reason of any negligence on the part of this defendant.

Wherefore, defendant prays judgment that plaintiff take nothing by reason of his Amended Complaint on file herein; that defendant be awarded its costs and disbursements herein incurred and expended, and for such other and further relief as to the Court may seem just and proper in the premises.

ROBERT W. WALKER,

J. H. CUMMINS,

By /s/ J. H. CUMMINS,

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 4, 1951.

RULE 820

In switching cars the following must be observed:

(a) Warn persons in, on, or about cars before coupling to or moving them to avoid personal injury or damage to equipment or lading.

(b) Cars must not be shoved without taking proper safeguards to avoid accidents. Slack must be stretched to test couplings.

[Endorsed]: Filed Oct. 9, 1951.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Twenty-two Thousand Five Hundred Dollars (\$22,500.00).

/s/ JEROME A. STARR,
Foreman.

Filed at 6 o'clock and 45 minutes p.m.

C. W. CALBREATH,
Clerk.

By /s/ HOWARD F. MAGEE,
Deputy Clerk.

[Endorsed]: Filed Oct. 8, 1951.

In the United States District Court for the North-
ern District of California, Southern Division

No. 30360-Civil

JOSEPH J. SEAMAS,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation,

Defendant.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on October 1, 1951, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; Chris Papas, Esq., and Joseph D. Michael, Esq., appearing as attorneys for the plaintiff and Joseph Cummins, Esq., and G. L. Baraty, Esq., appearing as attorneys for the defendant, and the trial having been proceeded with on the 1st, 2nd, 3rd, 4th, 5th, and 8th days of October, in said year, and oral and documentary evidence on behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz.: "We, the Jury, find in favor of the Plaintiff and assess the damages against the defendant in the sum of Twenty-two Thousand Five Hundred Dollars (\$22,-

500.00), Jerome A. Starr, Foreman," and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiff do have and recover of and from said defendant the sum of Twenty-two Thousand Five Hundred Dollars (\$22,500.00) together with his costs herein expended taxed at \$.....

Dated October 9, 1951.

/s/ C. W. CALBREATH,
Clerk.

Entered in Civil Docket Oct. 9, 1951.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Defendant hereby moves the court to vacate and set aside the Judgment heretofore entered on October 9, 1951, in the above-entitled case and to grant the defendant a new trial upon the following grounds materially affecting the substantial rights of the defendant in said action:

- (1) Irregularity in the proceedings of the court and abuse of discretion by which defendant was prevented from having a fair trial;
- (2) Excessive damages appearing to have been given under the influence of passion and prejudice;

(3) Insufficiency of the evidence to justify the verdict.

(4) Error in law occurring at the trial.

Said motion is made and based upon the minutes and records of the court, the pleadings and papers on file herein and the reporter's transcript.

Dated October 18, 1951.

ROBERT W. WALKER,

J. H. CUMMINS,

GUS L. BARATY,

By /s/ J. H. CUMMINS,

Attorneys for Defendant.

Written Statement of Reasons in
Support of Motion

1. Defendant urges that the Court's examination of the defendant's witness, Mahan, constituting an irregularity by which defendant was prevented from having a fair trial. The Court's manner of questioning this witness, the Court's comments and questions asked, defendant regards as prejudicial.

2. Excessive damages were granted plaintiff, \$22,500 for a soft tissue injury and under all circumstances the damages were so great that the judgment should shock the conscience of the court.

3. There is insufficient evidence of injury and damages to justify the verdict and there is insufficient evidence of negligence to justify the verdict.

4. The instructions offered by plaintiff and given by the Court numbered 23 is erroneous in that it excuses any possible negligence on the part of the plaintiff and places an absolute liability on defendant. It reads as follows:

“When a foreman gives an employee an order, either expressly or by implication, the employee has a right to assume in the absence of warning or notice to the contrary, that he would not thereby be subjected to injury.”

Republic Iron and Steel vs. Berkes,
70 N.E. 815.

Points and Authorities

Rule 59, Federal Code of Civil Procedure.
45 U.S.C.A. Sec. 51, et seq.

Supplemental case authorities will be forwarded as quickly as possible.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Oct. 19, 1951.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

This matter having been argued, briefed and submitted for ruling,

It Is Ordered that defendant's motion for new trial be, and the same hereby is, Denied.

Dated November 28th, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

Republic Iron and Steel Co. vs. Berkes,
70 N.E. 815.

[Endorsed]: Filed Nov. 28, 1951.

[Title of District Court and Cause.]

ORDER GRANTING STAY OF EXECUTION

Good cause appearing therefor, it is hereby ordered that a stay of execution be granted on the judgment heretofore rendered herein, for a period up to and including the 31st day of December, 1951.

Done in open court this 21st day of December, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed Dec. 21, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF
APPEALS FOR THE NINTH CIRCUIT

To the Clerk of the Above-Entitled Court:

Notice is hereby given that the defendant, The Atchison, Topeka and Santa Fe Railway Company, hereby appeals to the Court of Appeals for the Ninth Circuit from the judgment entered in this action of the 9th day of October, 1951.

ROBERT W. WALKER,

J. H. CUMMINS,

PEART, BARATY &
HASSARD,

By /s/ ROBERT W. WALKER,
Attorneys for Defendant and
Appellant.

[Endorsed]: Filed Dec. 26, 1951.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Whereas, on the 9th day of October, 1951, a judgment was entered in the District Court of the United States, for the Northern District of California, Southern Division, in favor of the Plaintiff in the above-entitled action and against The Atchi-

son, Topeka and Santa Fe Railway Company, the defendant herein, and

Whereas, The Atchison, Topeka and Santa Fe Railway Company, defendant herein, desires to give an undertaking for stay on appeal as provided to be given under Rule 73(d) Federal Rules of Civil Procedure,

Now Therefore, in consideration of the premises and of such appeal, the undersigned, Indemnity Insurance Company of North America, a corporation, organized and existing under the laws of the State of Pennsylvania, and duly authorized to transact a general surety business in the State of California, does acknowledge itself bound as surety to said Joseph J. Seamas, and as surety for The Atchison, Topeka and Santa Fe Railway Company, defendant and appellant herein, in the sum of Two Hundred Fifty Dollars and no/100 (\$250.00), conditioned as provided in Rule 73(c) of the Federal Rules of Civil Procedure, to secure the payment of costs if the appeal is dismissed or the judgment affirmed or such costs as the Court of Appeals may award if the judgment is modified, and further the Indemnity Insurance Company of North America, does acknowledge itself bound as surety to said Joseph J. Seamas and as surety for The Atchison, Topeka and Santa Fe Railway Company, defendant and appellant herein, in the sum of Twenty-two Thousand Five Hundred Dollars (\$22,500.00) conditioned, as provided in Rule 73(d) of the Federal Rules of Civil Procedure, for the satisfaction of the judgment in full, together with interest at the

rate of 7% per annum for one year from the date of entry of the aforesaid judgment, October 9, 1951, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed and to satisfy in full such modification of the judgment and such costs, interest, and damages as the Appellate Court may adjudge and award.

In Witness Whereof, the said surety has caused these presents to be executed and its official seal attached by its duly authorized Attorney-in-Fact, at Los Angeles, California, the 24th day of December, 1951.

[Seal] INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,

By /s/ C. F. BATCHELDER,
Attorney-in-Fact.

Examined and recommended for approval as provided in Rule 8.

/s/ ROBERT W. WALKER,
Attorney for Defendant and
Appellant.

I hereby approve the foregoing bond this 26th day of December, 1951.

/s/ GEORGE B. HARRIS,
Judge of the United States
District Court.

State of California,
County of Los Angeles—ss.

On this 24th day of December in the year one thousand nine hundred and Fifty-one, before me, Blanche T. Moore, a Notary Public in and for the County of Los Angeles, personally appeared C. F. Batchelder, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the Indemnity Insurance Company of North America, and acknowledged to me that he subscribed the name of the Indemnity Insurance Company of North America thereto as principal, and his own name, as Attorney-in-fact.

[Seal] /s/ BLANCHE T. MOORE,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Nov. 1, 1953.

[Endorsed]: Filed Dec. 26, 1951.

[Title of District Court and Cause.]

NOTICE OF BOND HAVING BEEN
FILED ON APPEAL

To: The Plaintiff, Joseph J. Seamas, and to his Attorneys, Michael and Papas:

You and each of you will please take notice that a supersedeas bond was filed concurrently with the

fling of the Notice of Appeal and that said bond was filed by corporate surety.

Dated this 26th day of December, 1951.

ROBERT W. WALKER,
J. H. CUMMINS,
PEART, BARATY &
HASSARD,

By /s/ ROBERT W. WALKER,
Attorneys for Defendant and
Appellant.

[Endorsed]: Filed Dec. 26, 1951.

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Above Court:

You are hereby requested to make a transcript of record to be filed in the United States Court of Appeals for the Ninth Circuit, pursuant to an appeal hereby taken. You will include in said transcript:

1. All of the evidence introduced at the time of trial and transcribed by the court reporter.
2. All exhibits admitted into evidence.
3. All stipulations of the parties admitted into evidence.

4. All orders, rulings and judgments of the court.
5. All pleadings presented to the court.
6. This Praeceptum and service thereon.

Said transcript is to be prepared as required by law and the rules of the court and the Federal Rules of Civil Procedure, and especially Rules 73 (g) and 75 (k) of the Rules of Civil Procedure for the District Courts of the United States.

Dated December 26, 1951.

ROBERT W. WALKER,

J. H. CUMMINS,

PEART, BARATY &
HASSARD,

By /s/ ROBERT W. WALKER,
Attorneys for Defendant and
Appellant.

[Endorsed]: Filed Dec. 26, 1951.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
TO BE CERTIFIED TO THE COURT OF
APPEALS FOR THE NINTH CIRCUIT

To the Clerk of the United States District Court
for the Northern District of California, South-
ern Division:

You are hereby requested to prepare the record
for the United States Court of Appeals for the
Ninth Circuit in connection with the appeal taken
herein, to consist of the following: The complete
record and all the proceedings and evidence in the
action, including all pleadings, testimony, exhibits,
depositions, verdicts, judgment and Notice of Ap-
peal.

You are requested to certify the foregoing to the
Court of Appeals for the Ninth Circuit within forty
(40) days from the date of the filing of the Notice
of Appeal.

Dated December 26, 1951.

ROBERT W. WALKER,

J. H. CUMMINS,

PEART, BARATY &

HASSARD,

By /s/ ROBERT W. WALKER,

Attorneys for Defendant and
Appellant.

[Endorsed]: Filed Dec. 26, 1951.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 30360

JOSEPH J. SEAMAS,

Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FE RAIL-
WAY CO.,

Defendants.

Before: Hon. George B. Harris, Judge.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiff:

CHRIS PAPAS, ESQ., and
JOSEPH D. MICHAEL, ESQ.

For the Defendant:

ROBERT W. WALKER, ESQ.,
MESSRS. PEART, BARATY &
HAZARD, by
JOSEPH L. CUMMINS, ESQ., and
GUS L. BARATY, ESQ.

October 1, 1951, 10 A.M.

(A jury was duly impaneled and sworn.)

(Opening statement was made by counsel for
the plaintiff.)

JOSEPH JOHN SEAMAS

the plaintiff, called as a witness in his own behalf,
sworn.

The Clerk: Please state your name, your address
and your occupation to the Court and to the jury.

A. Joseph John Seamas, 2002 West Alpine.

The Clerk: And your operation?

A. Switchman.

Direct Examination

By Mr. Michael:

Q. Mr. Seamas, you said you live on Alpine
Street? A. West Alpine.

Q. Is that in Stockton, California?

A. Yes, sir.

Q. How long have you lived in Stockton, Mr.
Seamas? A. Since 1947, August 19th.

Q. I see. And what is your age, Mr. Seamas?

A. 37.

Q. And what does your family consist of?

A. A wife and one child.

Q. Mr. Seamas, who do you work for?

A. For the Santa Fe Railroad Company. [2*]

Q. And when did you first go to work for the
Santa Fe Railroad? A. On May 1, 1937.

Q. May 1, 1937? A. Yes, sir.

Q. Prior to that time who did you work for?

A. For the Northwestern Pacific Railroad Com-
pany.

Q. What years did you work for the North-
western Pacific Railroad Company?

(Testimony of Joseph John Seamas.)

A. In the years of 1930 into 1934.

Q. What type of work did you do with them?

A. As a blacksmith apprentice boy.

Q. Who else have you worked for?

A. For the Southern Pacific Railroad Company.

Q. And what years did you work for the Southern Pacific Railroad, do you recall?

A. The latter part of 1936 into 1937.

Q. What type of work did you do with the Southern Pacific Railroad Company?

A. Boilermaker helper.

Q. Mr. Seamas, have you been working for the Santa Fe Railroad steadily since 1937?

A. Pardon me, would you repeat?

Q. I say, have you been working for the Santa Fe Railroad steadily since 1937? [3]

A. Up to 1947.

Q. Up to 1947? A. Yes, sir.

Q. And what happened then?

Mr. Cummins: Just a moment. Object to what happened then. It is immaterial and irrelevant, if the Court please.

Mr. Michael: I will withdraw the question, your Honor.

The Court: The objection will be overruled.

Mr. Michael: Would you read the question, please?

(Question read by the reporter.)

Mr. Cummins: I am going to add to my objection, if the Court please, indefiniteness.

The Court: Overruled.

(Testimony of Joseph John Seamas.)

A. I don't know. So I was removed from service—

Mr. Cummins: Object, if the Court please. This is the purpose of my original objection. It is immaterial and irrelevant, bringing in outside issues.

The Court: I can't see the relevancy of any circumstances that borders on a period of time three or four years anterior to the accident unless you can demonstrate there be some casual relationship, or some logical relationship.

Mr. Michael: Your Honor, the only thing I was attempting to do was bring out the history of his working for the railroad, the times.

The Court: For that limited purpose, then it may be [4] received, but whatever reasons may have been underlying any prior termination of employment is not relevant to any controversy and I so charge the jury. Merely to show the continuity of relationship, that is all.

Mr. Michael: Yes, your Honor. Perhaps I may do it this way.

Q. Did you return to work for the Santa Fe Railroad, Mr. Seamas?

A. In 1949 on reinstatement.

Q. And about what date did you return to work for the Santa Fe Railroad in 1949, approximately?

A. That is uncertain. I don't know.

Q. Just approximately, do you remember the month? A. The month of June.

Q. June, 1949, you returned to service of the Santa Fe Railroad? A. Yes, sir.

(Testimony of Joseph John Seamas.)

Q. Now, in what capacities were you employed by the Santa Fe Railroad, Mr. Seamas? What was your job? A. Switchman.

Q. In what yards were you employed by the Santa Fe Railroad?

A. I was employed in the so-called San Francisco Terminal Division, in China Basin, San Francisco, in Richmond. That was from 1937 until 1941.

Q. Where else were you employed by the Santa Fe Railway?

A. Bakersfield, California, from 1941 until I was removed from [5] service.

Q. Where else were you employed? What other yards?

A. And Stockton, California, after reinstatement.

Q. When did you start working at the Mormon yard in Stockton? A. In July, I think.

Q. Of what year? A. In 1949.

Q. Had you started working as a switchman in the Mormon yard in July, 1949? A. Yes, sir.

Q. Were you employed by the Santa Fe Railroad on December 19—on December 9, 1950?

A. Yes, sir.

Q. And at that time were you injured while working for the Santa Fe Railroad?

A. Yes, sir.

Q. And do you recall what day of the week that was, Mr. Seamas? A. Saturday night.

Q. And that yard is located in Stockton, is that correct, the Mormon yard? A. Yes, sir.

(Testimony of Joseph John Seamas.)

Q. At what time, Mr. Seamas, did you report to work on the day that you were injured?

A. About three or four o'clock. It has been so long I—— [6]

Q. What was that, in the afternoon?

A. Saturday afternoon.

Q. Until what time were you to work that day? How late was your shift?

A. Eleven o'clock or twelve.

Q. Will you explain to the ladies and gentlemen of the jury what type of clothing you were wearing when you reported to work?

A. A pair of bib overalls that the bib comes up to your chest and has suspenders that hook on, and a jacket, and catpaws shoes that laced above the ankles about eight inches and a half.

Q. Did you wear any gloves? A. Yes, sir.

Q. What type of gloves were they?

A. Leather.

Q. Leather gloves? A. Yes, sir.

Q. Were they new or old gloves?

A. Oh, about three to four days old.

Q. And you say you had shoes on which came up over your ankles?

A. Just a little above the ankles, yes, sir.

Q. And what type of soles did you have on those shoes?

A. I think it was catpaw soles, those crepe——

Q. A rubber type of sole? [7]

A. It is a combination.

Q. Combination sole? A. Yes, sir.

(Testimony of Joseph John Seamas.)

Q. Did you report to work with any equipment that day? A. With my lantern.

Q. Your lantern? A. Yes, sir.

Q. Now, the clothes that you have described and the lantern, is that more or less the type of clothing that the railroad men wear when they are working?

A. Yes, sir.

Q. Now, with whom were you working on the day that you were injured, Mr. Seamas?

A. The foreman was Mr. L. A. Mahan, he is our foreman. My partner, the pinpuller, the other switchman, was Mr. Weith, and also Mr. Marrs and Mr. Strain, the fireman.

Q. And what was Mr. Marrs' job?

A. Engineer.

Q. Mr. Strain was the fireman?

A. Yes, sir.

Q. And Mr. Mahan was the foreman?

A. Yes, sir.

Q. And Mr. Weith was the pinpuller or switchman? A. Yes, sir.

Q. What was your job? [8] A. Field man.

Q. A field man. Now, Mr. Seamas, do these people compose what is called the crew, these five people? A. Yes, sir.

Q. And do they work together as a unit?

A. Yes, sir.

Q. And what is the job of a crew? What do they do, just generally?

A. Well, just generally when we report to work—like we go in, we find what they call a

(Testimony of Joseph John Seamas.)

register. It is a long sheet in our words, and after we find the register sheet the yardmaster issues the foreman switch lists which are in paper form and from then we go out and switch cars from one track to another in making up trains and breaking of trains. It is a regular routine. He gives us a copy of that switch list or either he makes one and that is how we all work together. It is no verbal when we are working. It is all with signals, hand signals and——

Q. Mr. Seamas, who directs the crew as to what switching to make?

A. The foreman of the crew.

Q. Is he more or less the boss of the crew?

A. He is the boss.

Q. And you say he is given this set of instructions by the company, this switch list? [9]

A. Yes, sir.

Q. Now, who runs the engineer.

A. The engineer.

Q. And is he the only person that runs the engine?

A. Well, that is out of my jurisdiction, but I believe he is. Sometimes the fireman runs it.

Q. Sometimes the fireman runs the engine, but the engineer and the fireman are both in the engine?

A. Yes, sir.

Q. Who instructs the engineer or the fireman if he happens to be taking the place of the engineer? Who instructs them when to move the engine and when not to move the engine?

(Testimony of Joseph John Seamas.)

A. The fireman.

Q. How does he instruct them? How does he advise them when to move and when not to move?

A. By signal.

Q. By signals, and for example, do they have a specific signal for going forward?

A. Yes, sir.

Q. And they have a specific signal for going backwards? A. Yes, sir.

Q. And a signal to stop? A. Yes, sir.

Q. And how are these signals given during the day, for example?

A. By daytime, between sunrise and sunset, by hand signals. [10]

Q. And how about during the evening?

A. And by night, night signals are required with a lantern.

Q. Now, during the switching operations you stated the engineer and fireman are on the engine. Now, where is the foreman and the pinpuller and the fieldman? Where are they?

A. Well, we are out on the ground on the area. The pinpuller is usually between the engineer and the foreman on the ground, and I am out doing the field work—throwing switches like I was told to.

Q. Now, you spoke of the pinpuller and his position. What does the pinpuller do? What is his job, Mr. Seamas?

A. Well, he cuts the cars off as the foreman gives the kick sign to kick the cars, or if he is to go into another track he is to ride on the end of a

(Testimony of Joseph John Seamas.)

cut of cars that the engines got hold of and take the cars and the engine or engines to where the location that the foreman has told him to, or cars.

Q. Now, you stated that you were a switchman, is that correct? A. Yes, sir.

Q. And you spoke briefly of your duties as a switchman. Now, on December 9, 1950, when you were injured, were you performing the duties of a switchman? A. Yes, sir.

Q. And do you recall, Mr. Seamas, approximately what time you were injured?

A. Around ten o'clock at night. [11]

Q. Do you recall the nature of the weather that night? A. Foggy.

Q. Foggy? A. Yes, sir.

Q. Was it dark also? A. Very dark.

Q. Mr. Seamas, I am going to call your attention to this diagram which I have placed on the blackboard. That purports to be a representation of the track layout in the Mormon yard in Stockton. Will you glance at that and tell me if that is more or less a substantial representation of the yard in Stockton? A. Yes, sir.

Q. Now, merely for the purpose of identification, Mr. Seamas, what is this track called?

A. The No. 1 lead track.

Q. The No. 1 lead track? A. Yes, sir.

Q. And what is this track here called? (Indicating.)

A. That is called No. 10 track, also the back lead track.

(Testimony of Joseph John Seamas.)

Q. The back lead track? A. Yes, sir.

Q. And what are these tracks called?

A. The rip tracks.

Q. Rip tracks? [12] A. Yes, sir.

Q. And what is this track here called, (indicating), Mr. Seamas?

A. That is called the tail track leading into the main line.

Q. Now, what instrument or gadget is used to join or separate these tracks?

A. A switch stand connected onto a bar at the end of each switch point to line the tracks in the direction that you want it to go.

Q. A switch then, and that is the method used for a—for manipulating these tracks?

A. Yes, sir.

Q. Is there a switch at this point (indicating)?

A. Yes, sir.

Q. What is that switch called?

A. That is called the bull switch.

Q. I will indicate that by a circled X. And are there switching stands at all these points where the various tracks join this lead track?

A. Yes, sir, with numbers.

Q. And what are they called?

A. No. 6 switch stand.

Q. I will just put a circled X with a number 6 around it for the purposes of identification. Likewise, is this the No. 5 switch stand right on down the line? [13] A. Yes, sir.

Q. Now, there are tracks joining the back lead

(Testimony of Joseph John Seamas.)

track. Are there also switch stands at those points?

A. Yes, sir.

Q. And are there switch stands at this area where the rip tracks come into this back lead track?

A. Yes, sir.

Q. And what direction is the top of the map here, the diagram? A. North.

Q. And the bottom is south? A. South.

Q. And east to the right and west to the left, is that correct? A. Yes, sir.

Q. Now, these tracks are called what, these various tracks here (indicating)?

A. Those are the regular numbered tracks from 1 over to 10, trainyard tracks.

Q. And they are as they are numbered at the present time, is that correct? A. Yes, sir.

Q. No. 1 being the lead track also?

A. Yes, sir.

Q. And No. 10 also being the back lead track, is that correct? [14] A. Yes, sir.

Q. And are these tracks numbered here (indicating)? A. Yes, sir.

Q. What are they numbered as?

A. They are numbered as 1 to 3, west to east.

Q. Now, Mr. Seamas, what type of work was the crew doing when they first reported for work that day? A. We had done——

Q. Just generally.

A. We had worked to pick up cars from—like we got there track No. 2, or track No. 5, it is hard to say now because it has been so long. They have

(Testimony of Joseph John Seamas.)

got the switch lists that we copy and had picked up some cars, and were making up trains preparing them for the different locations where they were going to go.

Q. And did they continue that type of work throughout your shift?

A. We did up until about 9:00, 9:30, somewheres around that neighborhood. Then we went to supper.

Q. You went to supper? A. Yes, sir.

Q. I see. And then you returned to work?

A. Yes, sir.

Q. How long did you take for supper?

A. Twenty minutes; sometimes it takes longer. But around [15] twenty to twenty-five minutes on supper.

Q. When you report back to work after supper do you work with the same crew? A. Yes, sir.

Q. And do you work with the same crew every day?

A. Yes, sir, seven days a week, every day.

Mr. Michael: Your Honor, I can go into the facts at this time, or if you would rather wait until after lunch——

The Court: All right, we will take the noon adjournment, ladies and gentlemen, and resume at two o'clock this afternoon. The same admonition to you. You may now retire.

(Thereupon an adjournment was taken until 2:00 p.m. this date.) [16]

October 1, 1951, 2 P.M.

JOSEPH J. SEAMAS

called as a witness in his own behalf, resumed the witness stand.

Direct Examination

(Continued)

By Mr. Michael:

Q. Mr. Seamas, this morning you testified that on December 9, 1950, you were employed by the Santa Fe Railroad Company and you were employed at the Mormon Yard in Stockton, California, is that correct? A. Yes, sir.

Q. And you further testified that at that time you were employed as a switchman and you had reported to work at the Mormon Yard at approximately three or four o'clock in the afternoon.

A. Yes, sir.

Q. This morning I also called your attention, Mr. Seamas, to this diagram on the board which more or less purports to be a representation of the track layout of the Mormon Yard in Stockton, and at that time you had an opportunity to observe it and you stated it more or less was a true representation; is that correct? A. Yes, sir, it was.

Q. Now, Mr. Seamas, would you be kind enough to step down to the blackboard and in your own words explain to the ladies [17] and gentlemen of the jury and the Court just what took place prior to the accident on December 9th?

A. Yes, sir.

(Testimony of Joseph John Seamas.)

Q. Just take your time; don't be in a hurry, Mr. Seamas.

A. At about 9:45 or 10:00 o'clock, or around that time, we had gotten our instructions from the yardmaster and came over to this area, this rip track area and in which these tracks 1, 2, and 3. Mr. Mahan and I walked over, and the engine came on around, Mr. Mahan following it, the pinpuller, and then we got some cars out of the rip tracks 1, 2, and 3.

Mr. Cummins: Excuse me, sir. I am having difficulty understanding, Judge; I'm sure maybe some of the jurors are having difficulty.

The Court: Has any of the jurors been unable to hear what has been said? Do you hear him? Are you able to hear him?

The Jurors: Yes.

The Court: All right. Counsel, you can move your chair over if you don't hear.

Mr. Cummins: Well, all right; I will move it over here.

The Witness: I'm sorry. We then gathered those five cars, put them on this track No. 10, the balance back into the rip tracks. We came against the five cars with the engine and coupled onto it. We proceeded up along the back lead track, the crew and I, the engine was slowed up. I got off at No. 9 switch stand, which is this cross here. They continued on up to [18] the tail track with the five cars, the engine and the crew. I then lined the switch which controls the switch points of No. 9

(Testimony of Joseph John Seamas.)

track, walked over to track No. 3 right across over into track No. 3 switch stand.

Mr. Michael: Mr. Seamas, just for the purpose of clarification, would you indicate with the colored chalk there the position where you stepped off the train and indicate that as S-1, please?

(Witness indicates on blackboard.)

Q. Now, will you indicate with this chalk the path that you followed to this other switch stand, please?

(Witness indicates on blackboard.)

Q. Just a dotted line will be fine.

(Witness indicates.)

Q. And will you label that as S-2 please? Now the point where you had gone to this switch stand.

(Witness indicates on blackboard.)

Q. Go ahead, Mr. Seamas. What happened next?

A. I lined this track 11 which was lined to go to track No. 3, so I threw the switch so it would be lined for track No. 2, which one of them five cars we had a hold of were to go. Then after lining my No. 3 track switch at the switch stand, I walked up to track No. 5 (indicating).

Q. Will you label that as S-3, please?

(Witness indicates.) [19]

A. —to line track No. 5. In the meantime Mr. Mahan had kicked the car going to No. 9 down, and he kicked—he kicked it, the pinpuller cut it off and

(Testimony of Joseph John Seamas.)

it was rolling down from up here down to go into No. 9 track.

Q. Would you indicate the position of the car when it came to rest on the No. 9 track, please? Just draw it in.

(Witness indicates on blackboard.)

Q. And then what took place after this car had been kicked down and come to rest on track 9 which you speak of?

A. After lining No. 5 switch stand for No. 5 switch, I proceeded—started to go toward No. 6, and I was half way between No. 6 and No. 5 track right here when this Mahan starts kicking another car. I knew this car right here, that had stopped to foul the other car that was coming to go into No. 6 track or No. 1 track lead and wouldn't clear. Mr. Mahan started to throw that switch and I hollered at him not to. That car then came down and tied onto this one—coupled onto this one. Shall I draw it?

Q. Yes, please.

A. I went ahead, continued on up and noticed that the coupling had made on the second car that he had kicked. I went up to the—on the opposite side of the car that coupled onto the first car. Mr. Mahan was on this side and I was about here. I told Mr. Mahan, I says, "I am going to go up and check that brake or see whether the brake was set." And he [20] says, "O.K., kid go ahead." On the northwest end of the car I went up to check that

(Testimony of Joseph John Seamas.)

brake. As I get up to the brake platform with my right foot I was knocked off.

Q. That is fine. Would you sit down, please, Mr. Seamas? Now, Mr. Seamas, just for the purposes of reiteration and clarification now, you stated that you pulled these five cars out of this area known as the rip track area, is that correct?

A. Yes, sir.

Q. And the train pulled these five cars out and proceeded along this area here called the back lead track, is that correct?

A. Yes, sir.

Q. And you stepped off at this point which is marked S-1, is that right?

A. Yes, sir.

Q. And what was the purpose of stepping off at this point S-1?

A. To line that switch.

Q. By lining the switch what do you mean, Mr. Seamas?

A. Well, the last car of the five cars we had a hold of going out with, was to go into No. 9 track first. [21]

Q. I see. And you had maneuvered the switch there so that as the car came down this area it would go into this track is that right?

A. Yes, sir.

Q. At that point you started to walk over to the switch which connects track 3 to this lead track; is that correct?

A. Yes, sir.

Q. And in the meantime where had the train gone?

A. Right east onto the tail track.

Q. And approximately where in the tail track had it come to a stop, do you recall?

(Testimony of Joseph John Seamas.)

A. I would say right underneath that "T" of "Track."

Q. Would that be the last or the rear, the most westerly car? A. Yes, sir.

Q. About this position here?

A. Somewhere in that neighborhood; it was foggy and I couldn't very well see.

Q. But it was in this general area?

A. Yes, sir.

Q. And then you proceeded to cross and to walk over to this switch stand on track 3?

A. Yes, sir.

Q. Did you line this switch?

A. Yes, sir. [22]

Q. Why did you line that switch, Mr. Seamas?

A. One of the cars—of the five cars had to go to track No. 2.

Q. In other words, you opened this switch so that a car proceeding along here would continue past the track 3 and go into 2; is that correct?

A. Yes, sir.

Q. And then you walked down to switch No. 4, is that right—switch stand No. 4?

A. No. 5, sir.

Q. Switch stand No. 5; excuse me; switch stand No. 5 right here. At that point had any of the cars been kicked from the train at that time when you reached switch stand No. 5? A. One car.

Q. One car had been kicked? A. Yes, sir.

Q. And that was the first car on the train?

A. Yes, sir.

(Testimony of Joseph John Seamas.)

Q. And that car was destined to go where, Mr. Seamas. A. No. 9 track.

Q. In other words, that car was supposed to come all the way down here and go into this track here, is that correct? A. Yes, sir.

Q. But it had come to a stop at this point here (indicating)? A. Yes, sir. [23]

Q. And then you proceeded after this car had been kicked——

Mr. Cummins: Excuse me, counsel. Your Honor, this is all repetitious. The plaintiff has already testified to this. I know from information I have received the plaintiff is buying a copy of the record. It is in the record. I object to further repetition. It is all argumentative.

The Court: Well, it is repetitious; I think the ground has been pretty well covered now. If you will bring the witness to the immediate time of the accident, counsel.

Mr. Michael: Yes, your Honor.

Q. Now then, Mr. Seamas, after these two cars had joined together—you said they had coupled, is that correct? A. Yes, sir.

Q. And that means the cars had joined together?
A. Yes, sir.

Q. And at that time you then proceeded to walk to the east end of this second car.

Mr. Cummins: I will object; ground that it is leading and suggestive as well as repetitious.

The Court: Where did you walk immediately after?

(Testimony of Joseph John Seamas.)

A. To the east end of the northeast end of the car.

Q. (By Mr. Michael): And then did you walk to the west end of this first car to check the brake?

A. Yes, sir, I did, sir.

Q. Now, Mr. Seamas, you said you climbed up on a ladder on [24] the northwest end of the first box car, is that correct? A. Yes, sir.

Mr. Cummins: I object, if the Court please. I don't want to be unduly obstreperous in this case, your Honor, but this has been a series of leading questions. I object to it.

Mr. Michael: The only reason I am questioning this way, your Honor, is just for the purpose of clarification. If they are leading, I am certainly sorry.

The Court: You may proceed, and try to avoid any repetition.

Mr. Michael: Yes, your Honor. Thank you.

The Court: The position of the plaintiff on the last question was on the car, on the ladder; is that correct?

Mr. Michael: Yes, your Honor.

The Court: And then what happened?

Q. (By Mr. Michael): Then what happened, Mr. Seamas?

A. I went up the side of the ladder, and just as I was stepping on the brake platform, I was knocked off.

Q. Mr. Seamas, at this time were the members

(Testimony of Joseph John Seamas.)

of the crew who were standing on the ground carrying lanterns? A. Yes, sir.

Q. And were you carrying a lantern?

A. Yes, sir.

Mr. Michael: May this be marked for identification?

The Court: So ordered.

(The lantern referred to was marked plaintiff's exhibit [25] No. 1 for identification.)

Q. (By Mr. Michael): Now, Mr. Seamas, I show you a lantern which has been marked as plaintiff's exhibit No. 1 for the purposes of identification and ask you if that is the type of lantern you had in your hand? A. Yes, sir.

Q. Is this the type of lantern the rest of the crew were using, do you recall?

A. Well, similar to that, the same as that.

Q. The same general type lantern?

A. Yes, sir.

Q. And as you climbed on the car how did you carry this lantern, Mr. Seamas?

A. Pass it to me, please.

(The lantern was passed to the witness.)

The procedure going up a ladder to avoid anything that you have on like that, so you can grab hold of your grabirons to get support and continue right up the way you are going to climb on the ladder, and that is the way I use them going up, to see where your foot goes and you can see where you are going to grab with your hand.

(Testimony of Joseph John Seamas.)

Mr. Michael: Your Honor, may be have that offered in evidence?

The Court: It may be marked in evidence.

(The lantern was thereupon marked plaintiff's exhibit No. 1 in evidence.) [26]

Q. (By Mr. Michael): Now at the time this accident took place, or at the time that you were injured, Mr. Seamas, how far could you see a person moving about?

A. You could see the light about 40 or 50 feet.

Q. And could you see anyone at any distance if he didn't have a light? A. No, sir.

Q. Now when you were climbing up the side of this boxcar did you hear any whistles from a train?

A. No, never.

Q. Did you hear any bells? A. No, sir.

Q. And what type of engine was being used by the crew at that time?

A. A Diesel electric.

Q. A Diesel electric? A. Yes, sir.

Q. Is that a quiet moving engine?

A. Yes, sir.

Q. Do you know whether any signals were given to the engineer at any time to move the engine?

A. No, sir.

Q. Now, in your estimation, Mr. Seamas, how far had you climbed up this boxcar at the time that you were knocked off? How high had you climbed up? [27]

A. About 10 to 12 feet.

Q. About 10 to 12 feet. And is the brake plat-

(Testimony of Joseph John Seamas.)

form on the same side of the car that the ladder is?

A. It is on the end—northwest end of the car.

Q. I see. And how were you able to go from the ladder to the brake platform? What procedure do you have to go through?

A. The car right on the corner has got a grab-iron on sort of a V shape where you grab onto it on top, hooked around what they call a grabiron, and hang on with both hands. I went to step down, and it is just about opposite the second to the last grabiron on the ladder, the platform was.

Q. What do you do, grab with one hand and fling over with the other or do you step around the edge of the car? A. You step around.

Q. You spoke of a brake platform. Is that a platform that is built out from the edge of the car?

A. Yes, sir.

Q. Is that large enough for a person to stand on?

A. Yes, sir.

Q. When you were knocked off of this boxcar did you feel a sudden jar, or was there a movement of the car?

A. It happened so fast, sir, I didn't know what happened.

Q. And how far did you fall from the edge of the car on the brake platform to the ground? Approximately what distance?

A. From 10 to 12 feet. [28]

Q. Ten to 12 feet. What happened to the car that you fell off of?

A. They rolled on into track No. 9.

(Testimony of Joseph John Seamas.)

Q. And approximately where did they roll into track No. 9, Mr. Seamas?

A. Well, the easterly car was just near the circle there, the east end of the second car.

Q. The easterly car was near this circle?

A. Yes, sir, the east end of it.

Q. In other words, it rolled down a path like this and went in; is that correct? A. Yes, sir.

Q. And the east end of the car was in approximately this position; is that about correct?

A. Yes, sir.

Q. And these cars were coupled together?

A. Yes, sir.

Q. And did they roll together?

A. Yes, sir.

Q. Do you know what the distance is from approximately this position to this position, Mr. Seamas (indicating)? A. Well——

Q. Just roughly.

Q. Between each one of those switch stands it is around near—a baggage car fits in between the both of those switch stands, [29] so a baggage car is around 75 or 80 feet long, and I would say about a little over 300 or 400 feet.

Q. The cars then rolled approximately 300 feet?

A. Yes, sir.

Q. Just roughly. Now where did you fall when you landed on the ground, with respect to the tracks or the cars?

A. It was either No. 7 track or No. 6 track, in between the both tracks; I don't recall.

(Testimony of Joseph John Seamas.)

Q. You fell to the north or to the south of the car?
A. To the north.

Q. We will call this car No. 1 and this car No. 2. Did you fall right beside the car just to the very north of it?

A. I don't know, sir; I know when I landed the other cars came and I thought they were going to get me.

Mr. Cummins: Just a moment; object to what the witness thought.

The Court: Sustained.

Mr. Michael: Just state what happened, Mr. Seamas.

A. It happened so quick, when I landed on my hands and knees between the both tracks that the cars roll on, I felt the other wheels of the other three cars that the engine had, or they were either coming on top of me or whether they were going by me, I didn't stop to think. I tried to get up in pain.

Q. Did you hear these cars roll down here? Did you hear the [30] cars moving, cars 1 and 2?

A. Those two cars they went down. I seen them go down when I was in the air.

Q. You fell in this position approximately here, is that correct?
A. In there some place.

Q. Just the general area. Now in which position did you land in when you reached the ground, Mr. Seamas?
A. On my hands and knees.

Q. And did you land more so on your knees or on your hands?

(Testimony of Joseph John Seamas.)

A. I don't know, it happened so quick.

Q. And do you recall the makeup of the ground that you landed on, what it was like? What was the nature of the ground that you fell on, do you recall?

A. Rough.

Q. Rough? A. Yes.

Q. Do you recall the texture of the ground? Was it dirt, or what was its makeup, do you remember?

A. Dirt.

Q. Dirt? A. Yes.

Q. Was it level, smooth, rough?

A. Rough.

Q. It was rough. Were you knocked unconscious when you [31] struck the ground?

A. No, sir.

Q. Mr. Seamas, how long did you remain on the ground, do you recall?

A. I don't know; I tried to get up right away.

Q. And were you able to get up right away?

A. In pain, yes, sir.

Q. You state you were able to get up with pain. Did you experience this pain when you landed on the ground?

A. Burning pain from my knees on up to the small of my back.

Q. And when you stood up, when you got up from the ground, did you still experience this pain in your legs and your back?

A. Yes, sir, all the time.

(Testimony of Joseph John Seamas.)

Q. After you stood up, what happened, Mr. Seamas?

A. The cars came to a stop and I came over to the south side of the back lead.

Q. Which car came to a stop?

A. The cars—the three cars that the engine had a hold of.

Q. In other words, these cars had come up here and stopped beside you? A. Yes, sir.

Q. They were approximately the position that cars 1 and 2 were before?

A. About in that position. [32]

Q. Then what happened, Mr. Seamas?

A. I crossed over to the south side of the track.

Q. Did you have any conversation with any person at that time? A. With Mr. Mahan.

Q. And what did you say?

A. He asked me, he said, “Are you hurt, son?” I said, “My legs and back are pretty sore.”

Mr. Cummins: Pardon me; I think there should be more foundation laid, your Honor, as to who was present.

Q. (By Mr. Michael): Who else was present at that time, Mr. Seamas?

A. The pinpuller, he was just a little easterly from me, and Mr. Mahan.

Q. Was anyone else present?

A. No, I didn't see no one else. There was two lights—Mr. Mahan's and his light.

Q. What did Mr. Mahan say to you?

(Testimony of Joseph John Seamas.)

A. "Are you hurt, son?" I said, "No; I feel pretty sore."

Q. Then did you remain on the job after you were injured, Mr. Seamas?

A. I remained on the job but—remained on the crew but the crew finished up.

Q. Did you do any switching?

A. No, sir, I just remained on the job.

Q. Why didn't you continue to do any switching? [33]

A. I was in pain.

Q. How long did the crew continue to work after you were injured?

A. Oh, about 30 or 40 minutes.

Q. And what happened after the crew had finished work?

A. We rode down about 45 or 50 car lengths down through one of the tracks to the yard office on the engine; all the crew went down with a light engine.

Q. And then I take it you went home?

A. No, sir, the foreman and my partner, Mr. Mahan, and Mr. Weith and the engineer and the fireman got off the train after we got down there and they went down to what we call the switchmen's locker room where we keep our lanterns and our clothes and I went upstairs to the yardmaster's office where we register to go on duty and off duty. And I asked Mr. Ellis, the yardmaster, if that was that for the day. He looked at his watch, and he says, "Yes, Joe, that's it; you fellows can go." Then I went downstairs into the locker room.

(Testimony of Joseph John Seamas.)

Q. How did you get home that night, Mr. Seamas? A. I drove my car home.

Q. And who was with you at that time?

A. Well, Mr. Weith—I gave him a ride from the switch shanty on up to the place where he was rooming. He offered to have me stop in to have a cup of coffee and I told him also——

Mr. Cummins: Objected to—— [34]

The Witness: I can't——

Mr. Cummins: Objection.

Mr. Michael: Just a minute, Mr. Seamas.

Mr. Cummins: Of course, Mr. Weith being another switchman, in the same capacity as he is, there is no proper foundation laid; it is incompetent; object to it.

The Court: Objection sustained.

Q. (By Mr. Michael): Mr. Seamas, approximately what time did you arrive home?

A. Eleven o'clock.

Q. Around eleven o'clock? A. Yes, sir.

Q. Did you go to bed at that time?

A. No, sir.

Q. What was your physical condition at that time?

A. Very bad, sir. I couldn't take my shoes off. I got home; my wife and the little dog were waiting for me in the garage, and she had to help me out of the car into the house and remove my shoes. I called the yardmaster and told him—Mr. Ellis—Mr. Jim Ellis—and he suggested me immediately to get a hold of a doctor and to make a report.

(Testimony of Joseph John Seamas.)

Q. You say you called Mr. Jim Ellis. And who is he? A. He is our yardmaster.

Q. Is he employed by the Santa Fe Railroad?

A. Yes, sir. [35]

Q. And had you made any other report of your injury prior to this time? A. Yes, sir.

Q. Who had you made any—

A. Just before I—right after I came down from the yardmaster's office, all five of us were in the switchmen's locker room, which is a small square the size (indicating), I made the statement, "What are you fellows trying to do, kill me?" They all snickered. I showed them my knee and one of the boys made a remark, "Well, are you going to make an accident report?" I said, "There might be nothing to it; it will save a lot of unnecessary writing." And I didn't think—we make a fall once in a while, or stumble; oh, well, it is nothing. I said, "If I don't feel any better by the time I get home, or by morning, I will notify the yardmaster to tell youse to make a report of the injury." Then Mr.—I gave Mr. Weith a ride home then.

Q. Now when you arrived home did you call a doctor? A. Yes, sir.

Q. And what was his name?

A. I tried to get Dr. Wiess, a company doctor, through the physician's office, and he wasn't home, or he couldn't be located; also Dr. McNeal, our physician's doctor, so my wife was kind of sick over everything, and she got hold of our neighbor

(Testimony of Joseph John Seamas.)

to try to locate a doctor. So we contacted Dr. Lucky. [36]

Q. Is he from Stockton? A. Yes, sir.

Q. And did he come out to your house to see you?

A. No, sir, he was at a Christmas party and Mr. Patterson got a hold of him through the physician's office and he was down—he came down to his office; he left the Christmas party, came down to his office to give me aid.

Q. Who is Mr. Patterson, Mr. Seamas?

A. My neighbor.

Q. He is your neighbor? A. Yes, sir.

Q. And did you see Dr. Lucky in his office?

A. Yes, sir.

Q. At approximately what time did you see Dr. Lucky, do you recall?

A. Around twelve o'clock that night.

Q. Twelve o'clock that night?

A. Yes, sir.

Q. And what type of treatment did he give you?

A. Well, he taped me up, taped my knee and gave me some quinine tablets to take to relieve pain—a prescription.

Q. Would you like a glass of water, Mr. Seamas?

A. Please.

(A glass of water was handed to the witness.)

Q. Do you care for more? [37]

A. No, that's fine.

(Testimony of Joseph John Seamas.)

Q. You say he taped your back, Mr. Seamas?

A. Yes, sir.

Q. And what parts of your back did he tape?

A. The lower part of my back.

Q. The lower part? A. Yes, sir.

Q. And did he tape the front of your body?

A. No, just in the back—the small of my back.

Q. And then did you return home?

A. We got—had a prescription to get some tablets, and then I went home.

Q. And how did you go home?

A. Mr. Patterson took me home.

Q. When you returned home did you go to bed, Mr. Seamas?

A. I did, but I didn't stay in bed long. I couldn't; I laid on the floor.

Q. You laid on the floor? A. Yes, sir.

Q. Why did you lay on the floor?

A. To get relief.

Q. And did you attempt to sleep on the bed?

A. I tried it but I have never been able to—

Q. Were you able to sleep that night?

A. No, sir. [38]

Q. On what type of bed were you sleeping at that time, Mr. Seamas?

A. We had just bought a new Sealy mattress—the wife bought it for me for my birthday, a new Sealy Sleep-Easy mattress, double bed.

Q. Now, Mr. Seamas, when was the next time you saw a doctor?

(Testimony of Joseph John Seamas.)

A. The next morning Dr. Wiess came out after my wife called him.

Q. And how did you feel the next morning?

A. It felt to me like I was worse, in pain.

Q. And where did you experience these pains?

A. Between my knees and throughout my back.

Q. Were they the same general type of pain that you experienced the night before? A. Worse.

Q. They felt more aggravated?

A. Yes, sir.

Q. And did the taping of the back help you any?

A. A little relief.

Q. Did the tablets you were given help you any?

A. Relieved the pain.

Q. You stated you saw the doctor on Sunday, and that was the next day? A. Yes, sir.

Q. And what was the name of the doctor? [39]

A. Dr. Wiess, our company doctor.

Q. What do you mean, "company doctor," Mr. Seamas? A. Well, our Santa Fe doctor.

Q. Is he from Stockton? A. Yes, sir.

Q. Did he examine you on Sunday?

A. He gave me a little examination and ordered me for X-rays next day.

Q. Where did he examine you, Mr. Seamas? At your home or in his office? A. At my home.

Q. At your home. And did he give you any type of treatment?

A. He gave me some capsules, I think—pills, and he told me to exercise my arms and my legs, bend

(Testimony of Joseph John Seamas.)

them, and to lay on a hard bed. So I told him I was laying on the floor.

Q. Did he offer you any other type of treatment at that time?

A. No, sir; he had me X-rayed the next morning.

Q. And that would be on Monday following the Saturday that you were injured? A. Yes, sir.

Q. Did Dr. Weiss also examine you on Monday, Mr. Seamas? A. No, sir.

Q. You just had the X-rays ordered?

A. Yes, sir.

Q. And did you have those X-rays taken? [40]

A. Yes, sir.

Q. And when was the next time you saw the doctor?

A. Every day up until about January the 2nd or 3rd.

Q. And which doctor were you seeing?

A. Dr. Wiess.

Q. You continued to see Dr. Wiess?

A. Yes, sir, every day.

Q. And during those days what type of treatment did he give you? A. Heat treatment.

Q. Is that the only type of treatment?

A. He gave me a shot with a needle; I don't know what it was.

Q. And did that treatment afford you any relief?

A. Temporary relief.

Q. And what was your physical condition during that period that you saw Dr. Wiess?

(Testimony of Joseph John Seamas.)

A. The same.

Q. Did you experience the same type of pains?

A. Yes, sir.

Q. Down your legs and the lower part of your back?

A. Yes, sir.

Q. And did the pains increase in feeling or did they become lesser?

A. After the heat treatment was worn out they would continue [41] on the same ache.

Q. You mean that this heat treatment would give you some type of relief?

A. Yes, sir.

Q. And how long would that last?

A. Oh, about four or five hours.

Q. And then the same things would re-occur?

A. Yes, sir.

Q. And how long did you continue to see Dr. Wiess, Mr. Seamas?

A. Up until January the 2nd when he released me to go to the Santa Fe Hospital in Los Angeles.

Q. And did you go to the Santa Fe Hospital in Los Angeles?

A. No, sir.

Q. And why not, Mr. Seamas?

A. Well, he gave me——

Mr. Cummins: Just a minute; I don't know that "why not" is material or relevant to this case. Object to it on that ground.

The Court: Overruled. You may answer.

A. Dr. Wiess gave me an entering form to the Coast Lines Hospital in Los Angeles, and Mr. Johnson gave me a pass with a permit to ride on our streamliner.

(Testimony of Joseph John Seamas.)

Mr. Cummins: Just a minute.

Mr. Michael: Just a minute, Mr. Seamas.

Mr. Cummins: This is the reason, your Honor, I objected [42] to the question. I felt I knew what was coming. I repeat my objection; it is immaterial and irrelevant why he didn't go to Los Angeles.

Mr. Michael: Mr. Seamas, without going into—excuse me, your Honor, if I may, perhaps I can instruct him not to answer as to what took place but just the reason he didn't go to Los Angeles. Just say why you didn't go to Los Angeles, Mr. Seamas.

A. Because I was told not to and informed not to by our claim adjuster and our trainmaster, Mr. Anderson, and Mr. Wilson.

Mr. Cummins: I move to strike that as incompetent.

The Court: The motion is granted.

Q. (By Mr. Michael): At this time did you see any other doctors, Mr. Seamas?

A. Dr. Lucky, by the request of Mr. Anderson of the Santa Fe.

Q. And do you recall when you went to see Dr. Lucky?

A. On the afternoon of January the 3rd.

Q. That would be of 1951, of course?

A. Yes, sir.

Q. What treatment did Dr. Lucky prescribe?

A. Traction.

Q. What do you mean by traction, Mr. Seamas?

A. He strapped—he taped my legs from just

(Testimony of Joseph John Seamas.)

about the knees down to my ankles, and had weight—15 pounds weight pulling on my legs and on bed boards. [43]

Q. And where did this traction take place?

A. At the St. Joseph's Hospital.

Q. At the St. Joseph's Hospital?

A. Yes, sir.

Q. Who sent you to St. Joseph's Hospital?

A. The Santa Fe Company.

Q. Which doctor? A. Dr. Lucky.

Q. Dr. Lucky sent you to St. Joseph's Hospital?

A. Yes, sir.

Q. How long did you remain in St. Joseph's Hospital?

A. From January 3rd until January the 19th.

Q. And during that time were you receiving this treatment that you spoke of as traction?

A. About 11 or 12 days of it.

Q. Did Dr. Lucky take any X-rays of you at this time? A. No, sir.

Q. Were any X-rays taken of you in the hospital? A. No, sir.

Q. Do you know of your own knowledge whether Dr. Lucky has an X-ray machine in his office?

A. Yes, sir.

Q. And were any X-rays of you taken in Dr. Lucky's office? A. No, sir.

Q. Did you receive any other treatment in the hospital, Mr. [44] Seamas?

A. Heat treatment and rubbing my back.

(Testimony of Joseph John Seamas.)

Q. And did that heat treatment or the treatment with traction afford you any relief?

A. I was—it gave a little—I was relaxed with it.

Q. Were you confined to bed all the time you were in the hospital?

A. Up to the last two days.

Q. And then were you able to get out of bed?

A. Yes, sir.

Q. Were you able to walk around at that time?

A. Yes, sir, experiencing pain.

Q. Did the doctor give you anything to help you walk at that time—prescribe any aids of any kind?

A. He gave me a little corset and told me to wear a little corset.

Q. A corset? A. Yes, sir.

Q. And will you describe this corset?

A. Well, it is a steel—made of steel bracing; it is about that high and about that—about that wide and about that round, fits around the small of my back to give me relief.

Q. Does that wrap around the complete part of your body? A. Yes, sir.

Q. And are there straps to adjust it to fit your body? A. Yes, sir. [45]

Q. And how long did you continue wearing this back brace or corset? A. I still got it.

Q. You still have it? A. Yes.

Q. Have you been wearing it since the time the doctor prescribed it for you?

A. Yes, sir. I have.

Q. Does that afford you any relief?

(Testimony of Joseph John Seamas.)

A. Yes, sir, it does.

Q. And how do you feel when you take this brace off? A. Very weak and in pain.

Q. Do you go to bed with this back brace?

A. No, sir.

Q. You take it off at night? A. Yes, sir.

Q. Do you wear it continually during the day?

A. Yes, sir, I do.

Q. Now, after your release from the hospital were you under the care of a doctor?

The Court: How long a period was he in the hospital?

Mr. Michael: Your Honor, he was in the hospital for approximately 12 days.

Q. What date were you released from the hospital, Mr. Seamas? A. January the 19th. [46]

Q. January the 19th. And after your release from the hospital did you remain under the care of a doctor?

A. Under the care of Dr. Lucky, yes, sir.

Q. And did you go to his office for examinations?

A. Every day when I could.

Q. For how long a period?

A. About a month and a half every day.

Q. And after the month and a half did you continue to go to Dr. Lucky?

A. Every other day.

Q. Every other day? A. Yes, sir.

Q. How long did you continue to go to him every other day?

(Testimony of Joseph John Seamas.)

A. About a month and a half.

The Court: What sort of treatment was accorded him?

Mr. Michael: I'm sorry, your Honor.

The Court: What treatment was accorded him when he went to the doctor's office? What happened? What did they do?

Q. (By Mr. Michael): What type of treatment did you receive when you went to the doctor's office, Mr. Seamas? A. Heat and rubbing treatment.

Q. That was for a period of three months?

A. Yes, sir.

Q. And did you continue to go to Dr. Lucky after this period of three months? [47]

A. Yes, sir, I have.

Q. During this period did Dr. Lucky ever give you a physical examination, Mr. Seamas?

A. Once or twice he just looked me over.

The Court: Were X-ray photographs taken?

Mr. Michael: No, he testified that no X-rays were taken by Dr. Lucky, your Honor. I will ask him again if the Court would like.

The Court: Have X-rays been taken?

Mr. Michael: Yes, X-rays have been taken by other physicians, your Honor.

Q. Now, Mr. Seamas, did Dr. Lucky ever give you any physical tests like having you bend down or stoop over? A. Once.

Q. And how did you feel during this period of time? A. The same thing as I feel now.

(Testimony of Joseph John Seamas.)

Q. Did you ever use any crutches during this period? A. No, sir, I never did.

Q. Have you ever used any crutches since the day of your injury? A. No, sir.

Q. Have you ever used any crutches at any time during your lifetime, Mr. Seamas?

A. Not that I remember.

Q. During the time that you were going to Dr. Lucky were you [48] able to bend over in a forward position and touch the ground like this (illustrating)?

A. I bend over, a little over, but experience pain.

Q. Where would you experience this pain?

A. The same location, in the small of my back.

Q. You continually have this pain in the small of your back? A. Yes, sir.

Q. Were you able to bend backwards at all like this? A. I tried; I experienced pain.

Q. You experienced the same type of pain?

A. Yes, sir.

Q. Were you able to bend back at all?

A. Very little; I tried it.

Q. Very little. Were you able to move your legs freely? A. No, sir.

Q. At this time did you use a cane or anything to help you walk? A. Yes, sir, I did.

Q. How long did you use this cane, do you recall?

A. Well, I used the cane about four or five months; I don't quite remember; I used it occasionally once in a while on rough ground. I tried to get away from it.

(Testimony of Joseph John Seamas.)

Q. Did you later get rid of the cane?

A. Yes, sir.

Q. At whose suggestion was that? [49]

A. Dr. Lucky's and Dr. McCoy's suggestion.

Q. They told you to get rid of the cane?

A. Yes, sir.

Q. Were you able to walk at this time?

A. Very slow, experienced pain all the time.

Mr. Michael: Your Honor, if the Court would care to take the recess at this time——

The Court: We will take the afternoon recess, a short recess, ladies and gentlemen, with the same admonition not to discuss the case under any conditions.

(Recess.)

Q. (By Mr. Michael): Mr. Seamas, before we go on to the—your testimony as to the other doctors you have seen, I would like to clarify just one point which is a little confusing, I believe, in my mind and perhaps in the mind of the Court and the jury. When you stepped up, or rather climbed up the ladder of this first car to check this hand brake, what caused you to fall, do you know?

A. I guess it was the three cars and the engine that hit the two cars I was on.

Q. And they struck that car, these two cars that you were on, and did they strike you with any degree of force?

A. It must have been, because it cut pretty hard. The impact was pretty hard.

(Testimony of Joseph John Seamas.)

Q. Is that what caused you to fall to the [50] ground? A. Yes, sir.

Q. That impact? A. Yes, sir.

Q. I see. Now, you have stated earlier that Dr. Lucky sent you to the hospital for several months following that, that you remained under his care, and that you visited him at various periods of time, is that correct? A. Yes, sir, it is.

Q. Now, what other doctors have you seen, Mr. Seamas? A. Dr. Dickson.

Q. Who sent you to Dr. Dickson?

A. The railroad company.

Q. How many times did you see Dr. Dickson?

A. Once.

Q. Where is Dr. Dickson located?

A. In Oakland.

Q. Do you recall when you saw him?

A. In February sometime.

Q. February. Did he give you an examination?

A. He gave me an examination and also taken X-rays.

Q. What type of examination did he give you?

A. Physical examination.

Q. Will you just describe what that examination consisted of, just in your own words?

A. He examined my limbs, limb by limb. My legs, leg by leg. [51] My arms, my back, and he took all my clothes off, took a very severe—punctured me in the back with needles for locations where the pain existed and on my legs, my feet, and also took a blood test.

(Testimony of Joseph John Seamas.)

Q. Did he take any X-rays at that time?

A. Yes, sir.

Q. Did he give you any type of treatment to follow?

A. He told me to carry on with Dr. Lucky's treatments.

Q. What other doctors have you seen?

A. Dr. McCoy.

Q. Where is Dr. McCoy located?

A. He is here in San Francisco.

Q. How many times did Dr. McCoy examine you?

A. If I remember, five or six times; maybe more.

Q. Did he give you a physical examination?

A. Yes, sir.

Q. How many physical examinations did Dr. McCoy give you?

A. Every time that I went to see him he gave me a physical and took X-rays.

Q. Did he take an X-ray? A. Yes, sir.

Q. Did he have X-rays taken of you each time you went to him? A. Yes, sir, he did.

Q. What did his physical examination consist of, Mr. Seamas? What did he have you do? [52]

A. He told me to exercise and try to walk and lay on a blanket on the floor.

Q. Perhaps I didn't make my question clear. Just describe the physical examination he gave you. What did he do or did he have you do?

A. Well, I undressed and he measured my legs above the knees and below the knees and gave me—

(Testimony of Joseph John Seamas.)

he stretched my legs and my arms and with needles he tried to locate locations on my back where the pain was at and on my legs. Also, I believe, he gave me one or two blood tests.

Q. Did he ask you what type of treatment you were being given? A. I don't remember.

Q. You don't recall. Now, at the present time, Mr. Seamas, do you have any trouble with your back and back of your legs? A. Yes, sir, I do.

Q. And do you experience this same type of pain in the back of your legs and in the small of your back? A. Yes, sir.

Mr. Cummins: Just a moment, I think this is too leading, your Honor. Let the witness talk. Object to it on the ground it is leading and suggestive, the attorney is testifying.

The Court: The witness may testify. You can state the type of pain you suffer so that the jurors may understand and so I may understand.

A. It is a pain that I cannot understand. I can't explain [53] it; in the small of my back, through my back at times. I try to bend over, I try to bend forward, I try to bend backward, and I experience a severe pain. My legs—it is hard to explain. I have tried everything I can to do better, but I can't. That is the best of my knowledge, Judge.

Q. (By Mr. Michael): Mr. Seamas, are you able to lift any objects? A. 15 or 20 pounds.

Q. Are you able to stoop down to pick up anything?

(Testimony of Joseph John Seamas.)

A. If I get down on my hands and knees. Still I experience with pain.

Q. Are you able to walk upstairs?

A. I try it but I experience pain.

Q. Are you able to walk freely?

A. No, sir.

Q. Do you feel—I will withdraw that. Does the change of weather affect you in any manner?

A. It has. Last night it did squarely.

Q. How does it affect you?

A. In the upper portion of my back and on my legs, the lower part.

Q. Are you able to sleep at nights at the present time, Mr. Seamas? A. No, sir.

Q. Were you able to sleep last night? [54]

A. I tried it on the bed, but I had to wind up on the floor with a blanket, at the hotel.

Q. Now, you have spoken several times about sleeping on the floor. Does that give you a little more relief than when you are on the bed?

A. Yes, sir, it does.

Q. How long have you been sleeping on the floor, Mr. Seamas?

A. Ever since the night I was injured.

Q. Now, prior to the time you were injured, what was the condition of your health, Mr. Seamas?

A. Gee, I wish I had it night.

Q. Well, just describe what was the condition of your health. A. Very good.

Q. Were you able to walk freely?

A. Yes, sir.

(Testimony of Joseph John Seamas.)

Q. Were you able to go fishing?

A. Go fishing, go dancing, play ball—had a wonderful time.

Q. Since you have been injured have you been able to do these things? A. No, sir, I haven't.

Q. Have you ever been able to do any work since you were injured?

A. No, I haven't, I have pittered around the house to help the wife.

Q. Have you ever attempted to obtain any jobs since the time you were injured? [55]

A. I tried it, but my condition in seeking employment was bad.

Q. Have you ever been injured before, Mr. Seamas? A. A couple of times.

Q. Where were you injured before, what area in the body?

A. Well, I got my back pinched a little.

Q. When did that take place? A. 1939.

Q. Where were you working at that time?

A. For the Santa Fe Company.

Q. How were you injured, Mr. Seamas?

A. Well, we were loading one of these freight barges that we got to haul these cars from Richmond to San Francisco and various points. I was squeezed against—between the pilot house of one of the barges.

Q. And did that cause you to be hospitalized at that time? A. About a month.

Q. You were in the hospital for about a month?

A. Yes, sir.

(Testimony of Joseph John Seamas.)

Q. I assume that caused you to leave your job?

A. Yes, sir.

Q. For that period, a month?

A. I was off until December.

Q. How long were you off your job, Mr. Seamas?

A. Until December.

Q. For how many days, approximately? [56]

A. Oh, about the latter part of August until the middle of December or first part of December.

Q. And that was in 1939? A. Yes, sir.

Q. Did the company pay you for the time that you lost from work? A. They gave me \$500.

Mr. Cummins: Just a moment, the question can be answered yes or no, and I will object to any other answer, if the Court please.

The Court: Well, any compensation he may have received in a prior accident would not be material here.

Mr. Cummins: Your Honor, if the answer is in I ask that it be stricken out.

The Court: The answer may go out.

Q. (By Mr. Michael): Mr. Seamas, did you fully recover from this injury? A. Yes, sir.

Q. Were you given a medical examination after this injury? A. Yes, sir.

Q. Who gave you that medical examination?

A. Santa Fe Railroad doctor.

Q. And you were able to return to work?

A. Yes, sir.

Q. Were you injured at any other time? [57]

A. Down at Bakersfield in 1946 or '47, either.

(Testimony of Joseph John Seamas.)

Q. Whom were you working for at that time?

A. For the Sante Fe Company.

Q. What happened at that time, Mr. Seamas?

A. Well, there was a defaulted switch stand and I went to throw it and it sprung across and hit me on the right side of my hip.

Q. Were you hospitalized at that time?

A. About a week or ten days.

Q. Did this injury cause you to lose any time from your job? A. About ten or fifteen days.

Q. Did you fully recover from this injury?

A. Yes, sir, I did.

Q. Were you given a physical examination after this injury? A. Two or three of them.

Q. Who gave you those physical examinations?

A. Well, one was the Sante Fe Company, one was the Southern Pacific Company, and one was the Western Pacific Railroad Company.

Q. And then were you allowed to return to your job after these examinations?

A. Well, prior to these Western Pacific and Southern Pacific examinations, Sante Fe had given one and I returned to that switch stand fully recovered.

Q. Mr. Seamas, what were your daily earnings at the time that [58] you were injured?

A. My daily earnings were \$12.26 a day, that is for the eight hours, but—

Mr. Cummins: Excuse me, Mr. Seamas. May I approach counsel? I have handed counsel a complete record in affidavit form from the paymaster.

(Testimony of Joseph John Seamas.)

Mr. Michael: May I have this marked for identification?

The Court: Yes.

The Clerk: Plaintiff's Exhibit No. 2 for identification only.

(Thereupon the affidavit referred to was marked Plaintiff's Exhibit No. 2 for identification.)

Q. (By Mr. Michael): Mr. Seamas, I am going to show you some figures in the form of an affidavit under the heading of the Atchison, Topeka and Sante Fe Railroad Company which sets out the month and the year of—rather, the year and the month of each year and sets out your gross earnings, your deductions, and your total net earnings. Will you glance at that, please? Is that correct?

A. Yes, about, possibly. I have got some stubs at home in my checks. That was the rate.

Q. Mr. Seamas, on November of 1950 they have your gross earnings for that month in the sum of \$351.38. Now, is that correct to the best of your knowledge?

A. It is the best of my knowledge. [59]

Q. And from the period of November, 1950, to December, 1950, did you receive the same rate of pay?

A. I received the same rate of pay up until I was injured, just approximately about the same. It was nine days—I don't usually lay off. I was working on a seven day job. I don't usually lay off.

(Testimony of Joseph John Seamas.)

Q. Would it be correct for me to state that in December of 1950 you were earning approximately \$351.38 per month? A. In November?

Q. In December of 1950.

A. I believe I would have earned a little more because I was about to enter a foreman's job which a man my junior is working now, bringing it up a little higher—bringing it around—not quite \$400.

Q. I note here, Mr. Seamas, that in September of 1950 you earned \$516.24 and in October you earned \$387.38 per month, and in November \$351.38. What is the cause of that fluctuation?

A. Well, our jobs, when I can work a job as a foreman, I work the job as a foreman since way back in 1939. When I can hold the job as a foreman I take a job as a foreman. That is the difference of \$12.21 to \$13.11 and on that other situation that brought up to—will you repeat that, \$400 or \$500?

Q. In September you were earning \$516.24 a month?

A. Yes, sir. That was caused—we are allowed a two week vacation and we have got 800 full days then, and I was only [60] allowed one week. I had to work the other week which—which the company was compensated on and I got paid. I got my two weeks vacation in with that \$500.

Mr. Michael: Will the Court excuse me while I show this to my associate?

The Court: Yes.

Mr. Michael: Your Honor, may we offer this in

(Testimony of Joseph John Seamas.)

as evidence, this affidavit submitted by the Sante Fe Company, to show that the plaintiff from December, 1949, to November, 1950, earned \$4,477.19?

The Court: It may be marked in evidence.

The Clerk: Plaintiff's Exhibit No. 2 in evidence.

(Thereupon the affidavit referred to was received in evidence as Plaintiff's Exhibit No. 2.)

Q. (By Mr. Michael): Mr. Seamas, at the present time are you able to work as a switchman?

A. No, I wish I could.

Q. And have you received any pay since the date of your accident from the company?

A. Back pay that was retroactive to us, and my vacation pay.

Q. And have you done any work for pay since the day of your injury? A. No, I never.

Mr. Michael: I have no further questions, your Honor. [61]

Cross-Examination

By Mr. Cummins:

Q. Mr. Seamas, during the period of time that you were not working for the Sante Fe from 1947 until 1949, what did you do with your time?

A. Sir, your answer is wrong on that 1947 to 1949.

Q. Well, if I misquoted you, please correct me.

A. Oh, I beg your pardon, it was my fault. I was thinking of something—that was when I was removed from service.

(Testimony of Joseph John Seamas.)

Q. That is what I am asking you about.

A. On August 9 of 1947 I seeked employment on the Southern Pacific at Tracy, California. Mr. O. E. Underhill, our trainmaster on the Southern Pacific from the Western Division asked me, "Lad——"

Q. Just a moment, Mr. Seamas. What I want to know is, did you work? What did you do with your time? I am not asking you for conversations with persons unknown to me. Were you employed during that period?

A. I was employed by the Southern Pacific from August 19, 1947, until I was refused employment on November 10th by the Southern Pacific.

Q. Did you work for anyone else then during that two year period?

A. Yes, sir. I then filed application on the Western Pacific on November 13th, hired out as a switchman on November 13th, passed my physical examination and worked for the Western [62] Pacific Railroad Company on the Western Division out of Stockton, California, as a switchman until I was reinstated by the Sante Fe in April.

Q. What period of time, if any, Mr. Seamas, were you unemployed between 1947 and 1949?

A. From the 11th day of August of 1947 was when my name was removed from the Sante Fe switchmen's roster in Bakersfield, California.

Q. Until when, Mr. Seamas?

A. Until I was reinstated in the month of April, 1949, or May.

(Testimony of Joseph John Seamas.)

Q. Mr. Seamas, I am sorry that I didn't make my question clear to you, sir. What period of time during the two years, 1947 to 1949, were you unemployed, is my question?

A. Unemployed—none.

Q. You weren't unemployed a day or a week or a month?

A. No, sir, I always seeked employment around when I was working or cut off the extra board on the Western Pacific.

Q. The day the Sante Fe let you out, the following day you went to work for another railroad, sir?

A. No, sir, I wasn't notified until the 18th day of August.

Q. Now what kind of work did you do for the Southern Pacific and for the Western Pacific?

A. Switchman, engine foreman.

Q. What is your total experience in years as a switchman, Mr. [63] Seamas?

A. Fourteen actual years.

Q. You have actually worked as a switchman for fourteen years?

A. From May 1, 1937, up until December 9th, when I was injured, I worked as a switchman and was used as a brakeman occasionally on the Valley Division.

Q. A brakeman does substantially the same kind of work as the switchman, does he not?

A. No, sir.

Q. Well, all right. You tell us the difference.

A. A brakeman is the man that runs out on

(Testimony of Joseph John Seamas.)

trains that the switchmen make up for him to take out. A switchman receives the cars that the brakeman, the conductor, bring into the yard with their trains.

Q. He is a comparable person in the train crew, isn't he; the brakeman is comparable to the switchman in a train crew except that the switchman works in the yard and the brakeman out on the line? Is that substantially correct, sir?

A. Yes, sir.

Q. All right. In any event, your total experience for the Santa Fe, the Southern Pacific and the Western Pacific have all been in the capacity of either switchman or brakeman; is that not correct, sir?

A. Yes, sir.

Q. All right, thank you. Now, isn't it so, Mr. Seamas, that [64] the engineer and the fireman interchange jobs because that is the way a fireman gets to be an engineer, through practical experience under the supervision of the engineer?

A. That is not my duties. I wouldn't know.

Q. Thank you. You were telling us on your direct examination that the engineer usually runs the train, but that the fireman sometimes does. You do know about that, don't you?

A. Yes, sir.

Q. And you do know, then, that the fireman occasionally runs the engine, don't you?

A. Yes.

Q. Now, you have told us in some detail, Mr. Seamas, precisely the moves that you made leading up to your alleged accident. You have told us that

(Testimony of Joseph John Seamas.)

you moved into the rip track and that you moved out, that you stepped off at the No. 9 switch, that from that point you walked up to the S-2, the No. 3 switch, and from there you walked to S-3 down here (indicating), where the cars were being coupled, and that subsequent to that you walked on the north side of the cars and had climbed up on the northwest corner of the westernmost car, and you gave us the details of how these cars were shoved down the track—kicked, I believe you used the word. Now, Mr. Seamas, can you tell the jury the move that was made after the alleged accident took place in equal detail?

A. After I was knocked off? [65]

Q. Yes.

A. Mr. Mahan and Mr. Weith put the balance of the cars away, reached down into track No. 9 and got that car out of the track No. 9 that was to go to No. 6 and put the cars in their proper tracks.

Q. What were you doing during that time?

A. If I recall, I was riding on the platform of the engine.

Q. All the time after the alleged accident took place you were riding on the front footboard of the engine?

A. The back footboard on the platform—not the footboard, the platform.

Q. In any event you were riding on the engine at all times after this accident took place?

A. No, sir.

(Testimony of Joseph John Seamas.)

Q. Did you throw any switches after the accident? A. No, sir, I couldn't.

Q. Did you do any work at all after the accident?

A. I rode that car into the California Traction track.

Q. Did you tie the handbrake?

A. I took it to a rest.

Q. Did you tie the handbrake?

A. I left the handbrake on it.

Q. Sir? A. I left the handbrake set on it.

Q. By that did you mean that you tightened the handbrake, sir? [66]

A. No, sir, I wound it around. It was one of those easy-turning ones.

Q. But you did set the handbrake on that car?

A. Yes, sir, with pain I did.

Q. You did it, but with pain? A. Yes, sir.

Q. Now, did you do any other work?

A. No, sir.

Q. That is all the work that you recall that you did after this alleged accident took place?

A. That was all the work I done, yes, sir.

Q. How far did you ride that car?

A. Right down about opposite that curve there.

See where that little mark is on track No. 2?

Q. What track, Mr. Seamas?

A. That track was the Traction track. It is the track north of the main line. None of those tracks.

Q. Not on any of these tracks (indicating)?

A. No, sir.

(Testimony of Joseph John Seamas.)

Q. How did you get to the brake platform, Mr. Seamas?

A. Mr. Mahan, when we reached down to get the other car, him and I were standing by. He said, "We will set that head car over to the tracks."

Q. Mr. Seamas, I don't want to disrupt your train of thought, but I asked you how did you get up to the brake platform? [67]

A. I am trying to tell you, sir. Mr. Mahan and I walked up to the brake on the head car and I climbed up the southeast end of the refrigerator car that was going into the tracks.

Q. By yourself, sir?

A. Yes, sir, with pain.

Q. And you also turned the wheel as you told the jury, with pain? A. Yes, sir.

Q. But you did turn it? A. I turned it.

Q. Now, to be absolutely correct about whether or not you worked after the accident, you did do that particular job after the accident. Now, did you do any other? A. No, sir, I never.

Q. You are sure of that?

A. I am positive, I am positive.

Q. Of course, you told the other members of the crew, Mr. Mahan and Mr. Weith, the pinpuller, that you had hurt your back, hadn't you?

A. I did, yes, sir.

Q. That is immediately after the accident happened, too, isn't it, Mr. Seamas?

A. As soon as they got down to that location they were standing at.

(Testimony of Joseph John Seamas.)

Q. There isn't any question in your mind but what you told [68] both of those gentlemen that you had been hurt, and that you had hurt your back immediately after this alleged accident happened, is there?

A. They asked me.

Q. All right. Where is Mr. Weith now, Mr. Seamas?

A. I don't know.

Q. Have you called on him or have you seen him since this accident happened?

A. I seen him once.

Q. Where is Mr. Mahan now, Mr. Seamas?

A. I don't know.

Q. You called on him about a month after this accident happened with another party and asked him to sign some papers, didn't you?

A. I didn't ask him to sign no papers, sir. I asked him if he would be kind enough to give me a statement, and he says he would give his statements to the president or the superintendent.

Q. Do you know where Mr. Weith is today?

A. I don't know where he is at today.

Q. Do you know what city he is in?

A. He might be in the city. I don't know where he is at.

Q. Now, Mr. Seamas, when you came down from the point marked S-2, which is the No. 3 switch, is this the route that you took marked in red on the north side of the drawing? I don't [69] believe this has been marked for identification or identified, your Honor. Could we call it something?

The Court: For the purpose of illustration call

(Testimony of Joseph John Seamas.)

it the next in order, whatever it may be, Mr. Clerk.

The Clerk: Plaintiff's Exhibit 3 for illustrative purposes only.

(Thereupon the diagram above referred to was marked Plaintiff's Exhibit No. 3 for illustrative purposes only.)

Q. (By Mr. Cummins): This red line that is most northerly, Mr. Seamas, is that the path you took to get to the cars that were being kicked?

A. Yes, sir.

Q. And the first car had already been kicked, had it, when you were walking toward them?

A. The first car had already been kicked when I was getting that No. 5 switch stand.

Q. When you were right here at No. 5 switch, then, the first car had already been kicked. Had it come to a rest or stopped? A. Yes, it had.

Q. What was the other car next to the east doing at that time?

A. I was between 5 and 6 switch stands and seen Mr. Mahan give a kick sign kicking it. I looked at my switch list and hollered at him, "Don't throw that switch," and he didn't. [70]

Q. What switch was Mr. Mahan about to throw?

A. That bull switch.

Q. The main switch here? A. Yes, sir.

Q. Where was the second car—we will call that the second car, it is marked that way, cars 1 and 2, when you yelled to Mr. Mahan?

A. I guess the engine still had hold of it, be-

(Testimony of Joseph John Seamas.)

cause when I hollered at him he had just gotten through giving a kick sign.

Q. Did the car come to a stop then before it reached the switch, the bull switch?

A. No, it came to a coupling on to the car that was to go to No. 9.

Q. What did throwing the switch have to do with that move? It wouldn't have changed anything, would it?

A. It would have caused severe damage or derailment on account of that car that was going into No. 9 track was foul or would have blocked the way of the car that was going to go to No. 6 track if he had of thrown the switch, but he didn't.

Q. Instead of that it came up to an easy coupling, is that right? A. Yes, sir.

Q. Now, where was your next move? Where did you go?

A. I followed the line toward No. 6 track switch stand, which was just opposite the coupling—just a little ways from the [71] coupling of the both cars, and I raised my lantern and seen that the pins had dropped.

Q. In other words, the couple had made between cars 1 and 2 and they were——

A. Coupled up.

Q. Coupled together? A. Yes.

Q. Then what did you do?

A. I went to the east end of the gondola and Mr. Mahan was on the south side of it, and I told him, I says, "Mr. Mahan"—I didn't say "Mr.

(Testimony of Joseph John Seamas.)

Mahan"; I says, "Lem, I am going to go down and check that brake on that first car." That was on the west end of the car that was going to No. 9 that had stopped.

Q. And he said?

A. He says "OK, kid, go ahead."

Q. How far were you standing from Mr. Mahan when you had this conversation with him?

A. Oh, I think about 10, 12 feet; on the opposite side of the—the width of the gondola.

Q. At that time were the cars standing still?

A. They were stopped.

Q. And the engine, too? A. Yes, sir.

Q. And he said to you, "Go ahead," did he?

A. He says "OK, son, go ahead." [72]

Q. There is no question in your mind but what this conversation took place?

A. I know it took place.

Q. Now, Mr. Seamas, at that time how far away was this other cut of cars that later came against these two cars which are marked here on Exhibit 3 for identification?

A. About in the location where they now stand.

Q. Well, how far would that be? Can you give us an idea?

A. Well, the west car that the engine had hold of—

Q. Yes, sir, the westernmost car that the engine had hold of. What is the distance from that to the easternmost car of those two cars?

A. About three to four cars.

(Testimony of Joseph John Seamas.)

Q. Mr. Seamas, you told us before on direct examination that they were about 150 feet. Would that be about three or four car lengths?

A. Yes.

Q. Earlier in your direct examination you told us that you could only see about 40 to 50 feet. How did you then know that those cars were 150 feet away?

A. The light of the pinpuller was up there. That was about my judgment.

Q. There was a light there, wasn't there?

A. The pinpuller was standing just this side of it.

Q. Mr. Seamas, in your direct testimony you told us that you [73] could see a light about 40 or 50 feet. Is it now your testimony that you could see a light 150 feet?

A. Well, sir, that fog is—comes in pockets, and I believe—I won't swear it was 150 feet or it wasn't. I know the cars were up in that location.

Q. Mr. Seamas, you understand that all of your testimony here today is under sworn testimony, don't you? A. I do, sir.

Q. All right. Now, you have worked as a switchman for 14 years. You know then that the engineer operates on the right-hand side of his engine, don't you? A. Yes, sir.

Q. And you know that the engine at the Mormon yard is almost invariably headed in an easterly direction when they are switching these tracks, don't you? A. Yes, sir.

(Testimony of Joseph John Seamas.) .

Q. And you know also that the engineer is that man that receives signals from the switchman, from the foreman south, on the south side of the train, don't you?

A. On that particular job, yes, sir.

Q. Yet on the day of this accident you were on the north side of the train, weren't you?

A. Yes, sir.

Q. And you climbed the train and the end of the car on the northwest corner, didn't you? [74]

A. Yes, sir.

Q. And at that time you were out of the sight of the switchman and you were out of sight of the engine foreman and they couldn't see you either, could they? A. No, sir.

Q. Because the cars, these two cars were between you and them, weren't they?

A. Yes, sir.

The Court: We might take the afternoon recess if this is convenient to counsel, and adjourn until tomorrow morning at ten o'clock. Ladies and gentlemen, I again admonish you not to discuss the case under any conditions or to form an opinion until the matter is submitted to you.

(Whereupon an adjournment was taken until tomorrow, Tuesday, October 2, 1951, at 10:00 a.m.) [75]

October 2, 1951—10:00 A.M.

JOSEPH JOHN SEAMAS

plaintiff herein, resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Cummins:

Q. Mr. Seamas, I think we were speaking yesterday evening just before we adjourned about your being on the north side of the cut of cars. Now, the tracks curve, all of these tracks curve so that they are concave. Do you understand the term "concave"?

A. No, I don't.

Q. All right. Let's put it this way. All these tracks at the Mormon yard, these switch leads that you use, curve so that in order for you, as a switchman, to see very many car lengths to the engine you have to be on the south side of a cut of cars, don't you?

A. Yes, sir.

Q. If you are on the north side the curvature of the track cuts off your view of the engine and you can't pass signals there, can you?

A. No, sir.

Q. The only way that the engineer or the fireman, either one, would know that you were on the north side of the cut would be on a signal passed by somebody on the south side, wouldn't it? [76]

A. Yes, sir.

Q. And the only way that any members of the crew would have to know where you were if you

(Testimony of Joseph John Seamas.)

were on the north side would be if you told one of them that you were going on the north side and going up on a car on the north side, isn't that so?

A. Yes, sir.

Q. So that if you didn't tell Mr. Mahan that you were going up on top of one of these cars he might not know about it unless he happened to see you or your light; isn't that so?

A. But I told him.

Q. Yes, I know you told us that you told him. Now, it isn't your custom there in the Mormon yard to pass signals to switch cars with whistles or bells, is it? A. Occasionally.

Q. You weren't doing it that night, were you? You were passing them with hand signals?

A. Yes, sir.

Q. You weren't using flares either, were you?

A. Not supposed to.

Q. When it gets sufficiently foggy that you can't see the regular switchman's lantern you sometimes use flares, don't you?

A. We do, but we are not supposed to.

Q. And you weren't doing it that night to increase your visibility? A. Yes, sir. [77]

Q. Now, I believe you told us where Mr. Mahan was when you say you walked up to the east end of these two cars. You said Mr. Mahan was right here (indicating) at this point marked the bull switch, right at the switch where the No. 1 track meets the back lead track; is that right?

A. Yes, sir.

(Testimony of Joseph John Seamas.)

Q. Where was Mr. Weith?

A. Mr. Weith at that time, as that was the only light was just easterly—southeasterly of where Mr. Mahan was.

Q. How far southeasterly of Mr. Mahan was the other light? A. I don't know.

Q. Can you give us an estimate?

A. Well, I would give an estimate to my knowledge of working as a foreman, it would be down at the west end of the west three cars that the engine had hold of.

Q. How far would that be from Mr. Mahan?

A. The weather was kind of foggy and to the best of my knowledge—it would be my judgment as past practice it would be around four or five car lengths from the bull switch.

Q. Did you see the other lantern presumably carried by Switchman Weith at the time you were talking or say you were talking to Mr. Mahan?

A. That was a lantern that I had seen.

Q. You think it was four or five car lengths toward the east; is that right? [78]

A. Southeast about four cars—probably four or five.

Q. That would be 250 feet, wouldn't it?

A. I don't know, I didn't measure. That is just rough.

Q. When was it that you could only see 40 feet?

A. Well, the way that tule fog is, sir, you walk a few feet and then I proceeded and it seemed it

(Testimony of Joseph John Seamas.)

was a little clearer, but it is hard to describe on account of that fog; tule fog.

Q. Mr. Seamas, at the time that coupling was made, this last kick move that you say at the time of which you say you fell, Mr. Weith was standing within 50 feet of Mr. Mahan, wasn't he?

A. Would you be kind enough to repeat that again so I can understand it?

Q. Yes, I sure will. At the time you say you fell, Mr. Weith was standing within 50 feet of Mr. Mahan, wasn't he?

A. At the time I fell I don't know where Mr. Weith was.

Q. All right. At the time you spoke to Mr. Mahan just before you went on the north side of the cars and climbed the northwest corner of the westernmost car, wasn't at that time Mr. Weith standing within 50 feet of Mr. Mahan?

A. I just told you just a while ago he was up about the west end of those three cars.

Q. OK. Now, the engine had hold of how many cars just before this last kick move?

A. Repeat that again, please?

Q. How many cars did the engine have hold of before that last [79] kick move was made when you claim you were knocked off the car?

A. It had hold of three.

Q. You think there were about three car lengths between the two cars that were coupled up here and the other cut of cars; isn't that right?

A. I said four or three, whatever it was—or five.

(Testimony of Joseph John Seamas.)

It was the distance of the light to my knowledge.

Q. So that would be a total of either six or seven car lengths that the engineer was from these two cars, wouldn't it?

A. Yes, sir. About that, yes, sir.

Q. And signals were actually being passed by lantern that distance, weren't they, seven car lengths?

A. I guess they were.

Q. And the engineer reacted on the signal and moved the cars, didn't he?

A. I don't know.

Q. Now, yesterday you told us, Mr. Seamas, that after the kick was made and after you fell, these cars moved three to four hundred feet down No. 9 track. Did you see them move that far, Mr. Seamas?

A. They wound up in that location where those two cars are marked on that No. 9 track.

Q. Did you see them down there after you fell?

A. Yes, sir.

Q. Three or four hundred feet without a light on those cars? [80]

A. I was down there, sir.

Q. You walked down there, did you, sir?

A. Yes, sir.

Q. Right after you got up?

A. Yes, sir.

Q. Now, Mr. Seamas, I am going to ask you to search your memory here very carefully. Wasn't it a fact that only one car, not two, was kicked toward No. 9 track?

A. I told you, sir, that one car was going to 9 and then the other one that was going to 6 was tied

(Testimony of Joseph John Seamas.)

on to the car that was going into No. 9. That had stopped and coupled on to the car that was going into No. 9.

Q. OK. And then you did come up to see that the coupling was made. That is your testimony, isn't it? A. It was opposite me.

Q. Now, after your alleged fall, Mr. Seamas, where did the cut of cars come to a stop, after they kicked, as you say, these two cars here?

A. Will you be kind enough to repeat that again?

Q. Yes, sir. After the kick move, after your fall, where did the cut of cars attached to the engine stop?

A. Just opposite me, my left side. Just about the location where they are (indicating), the two west cars there.

Q. Still these cars were between you and the foreman, then; is that right? [81]

A. I guess they were, because he was on the south side of them.

Q. Now, cars stand up above the track at least some distance, don't they? A. Yes, sir.

Q. You can see under them, can't you?

A. No, sir.

Q. You can't see under cars?

A. Not all the way.

Q. Sir? A. Not all the way.

Q. Well, were you down on the ground?

A. I got up right away, as best I could.

(Testimony of Joseph John Seamas.)

Q. Did you have your lantern down on the ground an instant?

A. I didn't stop to look or think. I had it gripped on to my hand.

Q. You told us yesterday you tried to get up right away. Did you get up right away?

A. That is what I just tried to tell you now.

Q. Now, as I understand it, yesterday on direct examination you told us, Mr. Seamas, that you didn't work after the accident, that you stayed on the job but you didn't actually do any work. Then, on cross-examination you recalled that you did climb one car and set a hand brake. Now, you will recall that I took your deposition in Stockton in your attorney's office [82] on September 7, 1951, before a notary public, and you were sworn to tell the truth, the same as you are here. Do you recall that?

A. Yes, sir, I do.

Q. May I approach the witness, your Honor?

The Court: Yes.

Q. You recall then that I asked you this question:

“Q. Did Mr. Weith ask you what happened?”—

Mr. Papas: Excuse me, Mr. Cummins. Would you mind giving us the page, please?

Mr. Cummins: I am sorry; it is page 25, and it is line 26.

Mr. Papas: Thank you.

Mr. Cummins (Reading):

“A. No.”

(Testimony of Joseph John Seamas.)

And I asked you:

“You just told him?”

And you answered:

“Yes.”

And I asked you:

“What did he say?”

You answered:

“ ‘Gee, are you sore?’ I says, ‘Pretty sore,’ or”——

And then I asked you the question:

“Anything else?” [83]

You answered:

“Then we went about to finish our work.

“Q. How long did you work after the accident? A. Oh, about 30 minutes.

“Q. That finished the job, did it?

“A. Yes, sir.”

You remember those questions and answers, don't you?

A. Will you repeat them again slow, so I can get ahold of it?

Q. Would you prefer to read them, sir?

A. No, you can read them, sir.

Q. All right, this is the portion in which I am interested, about which I mean to ask you further.

I asked you:

“Q. How long did you work”——

(Testimony of Joseph John Seamas.)

No. First question:

“Q. Anything else?”

“A. Then we went about to finish our work.

“Q. How long did you work after the accident? A. Oh, about 30 minutes.

“Q. That finished the job, did it?”

“A. Yes, sir.”

You remember that I asked you those questions and you gave those answers, don't you, sir?

A. Yes, sir.

Q. Now, you didn't tell me at the time of the taking of the deposition—of this deposition, that you stood idly by, did you? [84]

A. I stood idly by while we went to take that car over the traction. I didn't throw any switches.

Q. Did you finish the work, help finish the work?

A. I rode that car down into the traction.

Q. Now, Mr. Seamas, did it take you 30 to 40 minutes to ride that one car down the track and tie the brake?

A. I don't know the time it took, sir.

Q. You know it didn't take you that long to ride one car down one track and tie a brake on it, don't you? A. At times it takes longer.

Q. Did you do any other work that you haven't told us about after this alleged accident took place?

A. None at all.

Q. Now, did you actually get up on top of the brake platform, Mr. Seamans?

(Testimony of Joseph John Seamas.)

A. Which one do you mean, sir?

Q. Just before you say you were knocked off?

A. I had this right foot to get on it and I was knocked off. That is the best I can recall.

Q. You had your right foot on the brake platform but not your left foot? A. No, sir.

Q. Where was your left foot?

A. On the ladder.

Q. On the end ladder or on the side ladder? [85]

A. On the end ladder, sir.

Q. You mean that you are able to put one foot on the brake platform which is on the end of the car while you have your left foot on the side ladder clear around the corner?

A. May I explain it to you, sir?

Q. You may, sir. I have asked you the question.

A. I had gotten around to the end which the ladder comes on a square like a boxcar is and the ladders—you got to cross around. I was on the end getting ready to put this foot or leg on the brake platform and the impact knocked me off.

Q. Well, then you had your left foot on the end ladder, didn't you?

A. I had both feet on the end ladder and getting ready to put my right foot on the west end of the car as the brake platform is next to the ladder.

Q. All right. Now, that clarifies it just a little bit. You were on the end ladder instead of the side ladder?

A. I went up on the side ladder, sir, crossed over to the end ladder—like the end of this desk

(Testimony of Joseph John Seamas.)

right here (indicating). I crossed over to the second grabiron from the top, crossed over here (indicating). They got a grabiron that runs like that for us fellows to hang on—got on the end right alongside the second grabiron from the top of the ladder. There is a brake platform that we step on to operate the brake. [86]

Q. All right. Now, so that it is clear, just before the impact you were on the end of the car, on the ladder ready to place, or placing your right foot on the brake platform, is that correct?

A. To the best of my knowledge, yes.

Q. And your left foot was on the end ladder?

A. My left foot was on the end ladder.

Q. You will remember that the company asked you to fill out a form No. 1421, standard report of injured persons. You are familiar with those forms, aren't you?

A. Yes.

Q. This is your signature at the bottom of the page, isn't it, Mr. Seamas?

A. Yes.

Q. You filled that out on about the date it bears, December 18, 1950, did you, sir, or did you dictate it to someone—someone wrote it for you?

A. Sometime that time.

Q. Your memory was at least as clear then as to how this alleged accident happened as it is now, was it not?

A. To the best of my memory.

Q. I notice you were saying here in answer to the second question: "State what, in your judgment, was the cause of your injury, and what you were doing at the time it occurred?" You answered

(Testimony of Joseph John Seamas.)

this way: "I was standing on the brake [87] platform, releasing a brake on a cut of two cars, the other two members of the crew attempted to couple into the two cars and ran against them with such force that I was knocked off of the platform, to the ground."

Now, Mr. Seamas, could you tell us now with that refreshment of your memory, if you were standing on top of the brake platform to release the brake at the time of the impact?

A. I know to the best refreshment of my memory, sir, I was going to release the brake when I had a chance to, but I——

Q. Well, does this refresh your memory, that you actually had arrived at the brake platform and were up on top of it——

Mr. Papas: Excuse me, Mr. Seamas. Your Honor, may we agree—may we read this whole statement that is in there so that that will clarify the point? Might we read the whole thing?

Mr. Cummins: Your Honor, the remainder of the statement is not material to this point. I would like to proceed in my own way.

The Court: You may proceed in your own way, and you may ask him about it later.

A. I had one foot, the best that I can remember, sir, on the brake platform. Either I had it on or getting on it. My intentions were to get on the plat—my——

Q. Now, Mr. Mahan, if you were up on top of the brake platform with your lantern in your right

(Testimony of Joseph John Seamas.)

hand as you told us you were holding the lantern that light would be above the level of [88] the boxcar, wouldn't it? A. No, sir.

Q. How far from the top of the car is the brake platform, Mr. Seamas?

A. Well, for the best of my knowledge, between two and three feet down from the top of the car.

Q. Where is the brake staff or the brake wheel that you used to unloosen the brake?

A. It is just a tri—bit below the roof of the boxcar.

Q. When you are standing on top of the brake platform how high is your head above the top of the car? A. I don't remember, sir.

Q. You are about five feet eleven, aren't you?

A. Yes, sir.

Q. Let's say that the brake platform is 2½ feet below the top of the car. Your head would then be the difference between 2½ feet and 5 feet 11 inches, wouldn't it?

A. Repeat that again, please, slow, so I could understand it. I am sorry.

Q. Never mind, I will withdraw it. Now, Mr. Seamas, when the cut of cars hit the car on which you were was that something of a jolt?

A. Severe impact, sir.

Q. The cars then moved in a general westerly direction, with the impact, didn't they? [89]

A. I guess they did.

Q. The cars did move in a generally westerly direction with the impact, didn't they?

(Testimony of Joseph John Seamas.)

A. I guess they did.

Q. And the impact was in such a way that you were knocked towards the east, weren't you?

A. Toward the northwest, sir.

Q. You were knocked northwest?

A. Yes, towards the west.

Q. You were knocked towards the west, is that correct?

A. West or northwest. It happened, I didn't stop to look or find out. I was——

Q. In any event, you were not run over, were you?

A. I thought I was.

Q. Were you?

A. Well, I didn't stop to look.

Q. Did you have any marks on your body after this alleged accident took place?

A. Yes, I did.

Q. What marks did you have?

A. A gash on my left knee where I had landed, and a bruise on my right knee, and my hands were burning like you would rub your hands against a pavement.

Q. Have you told anyone, any of your fellow employees, you fell off the side ladder? [90]

A. I told them I got knocked off.

Q. Did you tell any of them you got knocked off the side ladder?

A. I told them I got knocked off.

Q. Did you tell any of them you got knocked off the side ladder, Mr. Seamas?

A. To my knowledge, I don't know.

(Testimony of Joseph John Seamas.)

Q. You don't know whether you did or not?

A. I don't know.

Q. You may have told someone that you did get knocked off the side ladder?

A. I told them I got knocked off.

Q. You don't know whether, at this time, you did tell someone of your fellow employees it was the side ladder you got knocked off of?

A. I told them that I got off about the brake platform or on the brake platform, I don't recall.

Q. Could you see any lanterns of either Mr. Mahan or the pin puller, Mr. Weith, when you were on the side of the car and were up on top of the brake platform? A. No, sir.

Q. You didn't see any lanterns?

A. No, sir.

Q. Now, Mr. Seamas, on every freight car there is an "A" end and also a "B" end, isn't that [91] right? A. Yes, sir.

Q. The "B" end is the brake end, where the brake is, isn't it? A. Yes, sir.

Q. In this instance the "B" end or brake end, was on the west side or westernmost one that you climb up on, is that right? A. Yes, sir.

Q. And there are four ladders on that car and four separate ways of getting up on it to the brake platform, aren't there? A. Yes, sir.

Q. There is one on the end—west end of the car, on the north side of the car? A. Northwest.

Q. Both of which are on the northwest corner. That is two of the ladders, isn't it?

(Testimony of Joseph John Seamas.)

A. Yes, sir.

Q. Now, similarly, there are two ladders on the southeast corner, on the side of the car and one on the end of the car, is that not correct?

A. Yes, sir.

Q. If you are working on the side where the signals are being passed, in order to get to the brake end of the car, placed as this one was placed, you could climb up either ladders at the southeast end to get on top of the car and walk on the top of the car on the catwalk to the brake platform, couldn't you? [92]

A. Then you would have to step down to——

Q. That is right?

A. ——two grabirons below, causing it more difficult.

Q. Just a minute, Mr. Seamas. I asked you, Mr. Seamas, if you could get to the brake platform by that route?

A. By stepping down to the platform.

Q. At all times you would be within view of anyone on the ground where they could pass signals to the engine if you went that route, wouldn't you?

A. Yes, sir.

Q. Mr. Seamas, after you quit work the day that you say you fell off the car, or were knocked off the car, you went to the register room, didn't you, with the other crew members?

A. I went to the register room, sir.

Q. So that the jury will understand a little better what the register room is, the law requires you

(Testimony of Joseph John Seamas.)

to go there and sign that you are to work, isn't that right? A. Yes.

Q. You signed the law sheet? A. Yes, sir.

Q. And all the crew members are required to do that, aren't they? A. Yes, sir.

Q. Now, on the evening in question you finished your work before the usual quitting time, and Mr. Ellis, held you and the other employees, other members of the crew, for 25 or [93] 30 minutes before he would release you from duty, isn't that right? Do you remember that?

A. Mr. Ellis told me to make—I asked him—it was around 20 or 25 minutes, the way you said, before our time was up—that we were all through, that that was it for the day, and by the time that I signed the register sheet, by that time I signed the register sheet.

Q. How long did you stay there?

A. I don't remember. I just signed the register sheet and went down to the locker room.

Q. Mr. Ellis was the yardmaster that night, wasn't he? A. Yes, sir.

Q. He is the man that makes reports of injuries if any occur, and to whom to report an injury if one occurs, isn't he? A. Yes, sir.

Q. Did you tell Mr. Ellis you were injured?

A. As soon as I got home.

Q. Mr. Seamas, you talked to Mr. Ellis that night, didn't you?

A. I just asked him, "Mr. Ellis—Jim, is that it?" He pulled his watch out and said, "Be-

(Testimony of Joseph John Seamas.)

snickered like a bunch of school kids. They thought I was kidding. I said, "No, look at my knee." They seen my knee with their own truthful eyes where it was gashed, and my left knee was bruised. Said—somebody said, "Do you want to make a report?" I said, "Oh, this isn't nothing."

You know, avoid a lot of unnecessary writing, we do take a few stumbles like we do on any kind of a job. I don't like to make unnecessary reports. I told them, "If I don't show up in the morning, or I don't feel a bit better I will call the yardmaster."

Q. Mr. Seamas, did you tell Mr. Marrs, and the other members of the engine and train crew that your back hurt? A. Yes, sir.

Q. Right at the switchmen's locker room?

A. I told him my back was sore and my legs was sore.

Q. Were they hurting you very much?

A. They were.

Q. You told all of them that your back hurt, that is right, is it? A. Yes, sir.

Q. Mr. Seamas, you know Tug Wilson, don't you? [97] A. Yes, sir.

Q. Trainmaster, isn't he? A. Yes, sir.

Q. You know James Anderson, claims adjuster, too, don't you? A. Yes.

Q. Both of them were on the platform with a pass on the Golden Gate for you to go to the Los Angeles hospital at one time, weren't they?

A. No, sir.

(Testimony of Joseph John Seamas.)

Q. Did you see Mr. Tug Wilson sitting right there in the back of the court room?

A. Yes, sir; I face him, sir.

Q. Do you see Mr. Anderson sitting here in the back of the court room, too? A. I do, sir.

Q. Did you meet them at a station platform in Stockton after this injury occurred, or after this alleged injury occurred? A. I did, sir.

Q. They were there on the station platform?

A. No, sir.

Q. You didn't meet them there?

A. I met them inside of the door of the station.

Q. Mr. Peterson was with you, is that right?

A. No, sir. [98]

Q. At least the three of you were there, weren't you? A. No, sir.

Q. Who was there?

A. My neighbor, Mr. Patterson.

Q. And Mr. Anderson and Mr. Wilson?

A. Yes, sir, and myself.

Q. You were there at train time to get on the Golden Gate, were you? A. Yes.

Q. That is the streamline train, isn't it?

A. Yes.

Q. At that time Mr. Anderson told you, didn't he—asked you whether you wanted to stay in Stockton or go to Los Angeles to the hospital?

A. Yes, sir.

Q. And he told you you could have the doctor of your choice, didn't he? A. Yes.

(Testimony of Joseph John Seamas.)

Q. And you said you would continue with Dr. Lucky, didn't you? A. No, sir.

Q. Did you make a choice?

A. By their request.

Q. What did Mr. Anderson say to you?

A. It was so complicated, sir, that I wanted to go get relief.

Q. What did Mr. Anderson say to you, Mr. [99] Seamas?

A. I don't recall, but I have got a witness that was there that heard the conversation, sir.

Q. Didn't Mr. Anderson tell you the Santa Fe would pay the bills of any doctor of your choice to take care of you?

A. It has been so long, I don't know, sir. I was in misery. My partner may be able to answer that, that question, sir.

Q. Now, Mr. Seamas, your counsel asked you yesterday whether or not Dr. Lucky took any X-rays of you and if he examined you at all or just kind of hit or miss. Did he examine you?

A. Once or twice.

Q. Did he give you a several minutes examination? A. Several minutes.

Q. Have you take your clothes off?

A. Half way.

Q. Down to your waist?

A. About to my waist, yes.

Q. You had X-rays taken two days after this—after December 9, 1950, didn't you?

A. Two or three days, I am not sure. It is on the records, two or three days.

(Testimony of Joseph John Seamas.)

Q. And those X-rays were turned over to Dr. Lucky with your knowledge and consent, weren't they, and he has them now? A. Yes.

Mr. Cummins: I will be through in a moment, your Honor.

Q. Haven't you had some income since this accident happened? [100] A. No, sir.

Q. You haven't received any money at all?

A. Other than my insurance, the Continental Casualty, and the Railroad Retirement and my back pay that was awarded to us some time from the time I was working, the time of the National Agreement settlement; and the vacation that I earned last year, I received that the first of May, which was the amount of about \$150.00.

Q. All right, sir. Well, Mr. Seamas, you told us that the change in the weather caused your upper back to hurt you. Did you mean to say your upper back hurt you, too?

A. It is hard to explain. Throughout the upper section of my back and the lower portion.

Q. How often does the upper portion of your back hurt you?

A. It is hard to explain, sir. It depends how I sit or how I twist.

Q. Does it hurt you every week?

A. Repeat that, please?

Q. Does the upper portion of your back hurt you every week? A. No, sir.

Q. Every month or every day? Tell us about it, if you will, please, sir?

(Testimony of Joseph John Seamas.)

A. I can't explain it. It is a pain that I can't explain. [101]

Q. Is it the same kind of pain that you have in your lower back? A. Very similar.

Q. And you have had that ever since this accident took place?

A. In the lower portion of my back, yes, sir.

Q. The upper portion of your back, too?

A. Yes, sir.

Q. Mr. Seamas, in 1939, you were wedged between a car and a stanchion, weren't you?

A. Yes, sir.

Q. You lost approximately four months lost time on that occasion, didn't you, from your work?

A. September, October, November, December—about four months.

Q. The small of your back was involved? The lower part of your back was involved in that injury, wasn't it? A. I don't remember.

Q. You had an operation on your back on that occasion, too, didn't you?

A. Not an operation, sir.

Q. Didn't you have a hematoma lanced and a tube inserted and drained right in the small of your back? Don't you remember that?

A. I don't know, sir. I don't know what you call it.

Q. I used a technical term which you wouldn't have any reason [102] for knowing, and I apologize. Didn't you have an operation, in 1939, to the small of your back?

(Testimony of Joseph John Seamas.)

A. I know they took some blood out of one of the veins right in my hip here and I recovered from that.

Q. The small or lower part of your back hurt you, didn't it, in 1939?

A. It was toward the upper part right up below my shoulders.

Q. Right below your shoulders on that occasion?

A. Similar to that, sir.

Mr. Cummins: Your Honor, rather than take time to look at the records, may we have the morning recess at this time?

The Court: We will take the morning recess, ladies and gentlemen. Same admonition to you, ladies and gentlemen of the jury, not to discuss the case under any conditions.

(Whereupon, a short recess was taken.)

Mr. Cummins (Continuing): Mr. Seamas, you recall being in the Santa Fe Coast Lines Hospital, your employees' association hospital in Los Angeles in 1939, following your back injury, don't you, sir?

A. Yes.

Q. You recall at that time you had a large bruise right at the lower part of your back, don't you?

A. On the upper part of my back; just below my shoulders, sir.

Q. Below your shoulders. At that time X-rays were taken of [103] your lower back, weren't they?

A. I don't know. They took X-rays, sir.

(Testimony of Joseph John Seamas.)

Q. How long were you in the hospital in 1939, Mr. Seamas?

A. From—the best I can remember was from August 28th—it was either the latter part of September, and it could have been the first part of October. I won't swear.

Q. May I ask you sir, this, is it your testimony here now that in 1939 you didn't hurt the lower part of your back?

A. It has been so long I don't remember, sir.

Q. You don't remember?

A. I don't remember.

Mr. Cummins: That is all.

The Court: You may examine the witness.

Redirect Examination

By Mr. Michael:

Your Honor, there has been some confusion as to the "A" and "B" end of the car and the ladder so we have brought in with us this morning a small replica of a boxcar with the "A" and "B" ends just for purposes of clarification. I would like to show this to the witness and allow him to explain.

The Court: You may use it for that purpose. Does that have a hand brake on it or any similar brake?

Mr. Michael: Yes, your Honor.

The Court: By the way, what type of brake was this, Mr. Seamas? [104]

(Testimony of Joseph John Seamas.)

The Witness: An Ajax.

The Court: Is that a hand-manipulated brake?

The Witness: By a wheel, yes, sir.

The Court: Where is the wheel, on the side of the car or on the upper?

The Witness: On the west end of the car, on the west end brake. It has got gears inside that pulls up by the turn of that wheel.

The Court: These jurors have never seen a boxcar. You tell them about it. Maybe they are not familiar with it.

The Witness: When we speak of Ajax brakes—maybe that one is similar.

Q. (By Mr. Michael): Mr. Seamas, I am going to show you a boxcar and ask you if this is similar to the type of boxcar that you climbed on, and calling your attention to the ladders on the side of the boxcar and the brake on the end of the boxcar and this end of the boxcar (indicating).

Now, first we spoke of an "A" and "B" end of a boxcar. Which is the "B" end of a boxcar, Mr. Seamas?

A. The "B" end of the boxcar is the end that the brake is on.

Q. The end that the brake is on? A. Yes.

Q. And this is the "A" end (indicating), is that correct? A. Yes, sir. [105]

Q. If you will note here there is a little black wheel which I imagine is supposed to be the brake on this model. Is that in the same substantial posi-

(Testimony of Joseph John Seamas.)

tion that the brake was on in the car which you were knocked off of?

A. Can I get closer and take a good look at it?
(Witness examines model.) Very similar.

Q. In other words, the wheel which operates the brake was on the end of the boxcar?

A. On the end of the boxcar just in that location.

Q. Now, this car in relation to this diagram would be—if this were the “B” end would be in about this position (indicating), isn’t that correct?

A. Yes, sir.

Q. And when you walked around you walked around this side, is that correct? A. Yes, sir.

Q. Now, will you explain to the ladies and gentlemen of the jury—and you hold this in your hand when you are explaining—just how you climbed on that boxcar and what you did when you were going to attempt to release this brake? Just hold it up so the ladies and gentlemen of the jury can see it.

A. I came down the north side of both cars and about the ladder here which is small. You can see a little stirrup right in the bottom. I went up, crossed over, hanging on to this little grabiron that we call the top grabiron for a jar when you are traveling to hang on so you won’t get jerked off, crossed [106] over and here is what I was trying to explain. The second grabiron right here from the top—not this one, but this one and this one (indicating) as it is just about even or just a little below the second grabiron from the top, and I had hold

(Testimony of Joseph John Seamas.)

of it, foot on the brake platform to check and see if the ratchet was tight, loose, which I never had a chance to do. The impact hit like that (indicating) and I don't know whether I went down or forward, but the cars went on into No. 9. That is the best I can explain it to you.

Q. Now, Mr. Seamas, as you were reaching for this brake do you remember just prior to the time you were knocked off, where was your right foot, on which ladder, the side ladder here or the back ladder, do you recall?

A. My left foot was on the end ladder.

Q. That would be this ladder here (indicating)?

A. Yes, sir.

Q. And where was your right foot?

A. Either on the brake platform or getting on the brake platform. It happened so long ago I don't remember, but if I put it on the statement 1428 it could have been that I was on the brake platform to check the brake and never had a chance to even put the light on.

Q. How large is this brake platform on the "B" end of the boxcar?

A. Enough to hold your body. [107]

Q. How wide, approximately?

A. Oh, I don't know, to tell you the truth. I wouldn't want to say. I know it holds—I have got a big foot, and it holds my foot good.

Q. How wide is it, would you say, from this point to this point (indicating)?

A. May I see this?

(Testimony of Joseph John Seamas.)

Q. No, on the car that you were knocked off of?

A. It is either three or four feet across with a little groove in the center of it to allow—some of those Ajax have a steel rod hooked on. On top of the steel rod it has a chain that winds in the gear like a jackscrew. That is what it is, a jackscrew. It is an Ajax brake, but it is a jackscrew, if anybody ever seen a jackscrew. When that big wheel turns it makes it easy to turn on account of these various little jaws in here that pull, and that pulls right on up and brings the brake shoes together.

Q. You say this is about three feet across here, Mr. Seamas (indicating)?

A. Three or four feet. I never measured it.

Q. Just approximately. Then how deep is this platform? How much does it stick out from the end of the car, just roughly in your own estimation? We know you haven't measured.

A. About—around 18 inches—16 or 18 inches, something similar to that. It is two pieces of plank about that wide [108] (indicating) bolted on to the steel brace that comes out and grooves down.

Q. Now, Mr. Seamas, you stated that you walked along the north side of the boxcar and climbed up the north ladder, is that correct?

A. Northwest ladder of the car.

Q. Now, to have reached that brake by going along the south side of the boxcar and—giving you the boxcar again, will you explain to the ladies and gentlemen of the jury how you would reach this

(Testimony of Joseph John Seamas.)

hand brake if you were to walk along the south side of the tracks? A. My past experience——

Q. Just explain the route that you would have to take on the boxcar, Mr. Seamas.

A. The route would either come down on the south side, cross over from the north side of the other car and walk down, go up this ladder, get on top of this conductor—what they call a conductor here—the walking conductor, walk on over then get down and climb on down to the brake platform, over and on down.

Q. Is there anything along this top to support you while you are walking? A. Yes, sir.

Q. What is there, a rail, or something along the top? A. No, sir, there isn't.

Q. There is no rail or anything to hang on [109] to? A. It is just as plain as it is there.

Q. Just this plain board running across the top of the car? A. Yes, sir.

Q. Now, Mr. Seamas, when you were knocked off of this car here, these cars continued down, is that correct, along the back lead here?

A. No, into No. 9 where those two are chalked.

Q. Excuse me—back down the back lead into No. 9. And the track curves at this point, isn't that correct? A. Slight curve, yes, sir.

Q. Now, you stated that you went into the register room to make an accident report, is that correct, after this accident took place, or the day after?

A. No, sir.

Mr. Cummins: Just a moment. Object to the

(Testimony of Joseph John Seamas.)

question as leading and suggestive and also not supported by the record. I don't think the witness made any such statement.

Mr. Michael: I am sorry, your Honor. I thought he testified on cross-examination that he went into the register room.

The Court: He did state that he went into the register room. Well, ask him what happened there, if you wish.

Q. (By Mr. Michael): What happened in the register room, Mr. Seamas?

A. Well, after we come down we rode down on the engine and went in the register room. Mr. Ellis was over on the other [110] side in the yardmaster's office and I was on this side. I waited until he got off the phone, he was talking, "Oh, Jim, is that it?" He looked at his watch, he looked up, "Well, kid," he says, "You might just as well go. Youse guys can't do anything else." I turned over to the right—pardon, before I turned to the right, I said, "It's sure swell." I didn't feel so hot,—just something, kind of a converse. I went over and registered off, then I went down to the locker room.

Q. Now, Mr. Seamas, you stated that you were injured in 1939, twelve years ago, is that correct?

A. Yes, sir.

Q. And after you were given this treatment and placed in the hospital, and after you had recuperated did you receive a physical examination?

A. I received an examination to resume full duties from the hospital association.

(Testimony of Joseph John Seamas.)

Q. And you were then released to go back to work?
A. Yes, sir.

Q. I see.

Mr. Michael: I have no other questions.

Recross-Examination

By Mr. Cummins:

Q. One very short question. Can you tell us please, Mr. Seamas, whether or not the car from which you were knocked off was damaged in any respect whatever? [113]

A. I don't know. I don't know, sir.

Mr. Cummins: That is all.

Mr. Michael: Does the Court have any questions, your Honor?

The Court: One question or two. What is the approximate distance, according to your recollection, as to the fall? How many feet would you estimate from the position where you were before the impact and after? How high did you fall from, eight feet, ten feet?

The Witness: It was either ten or twelve feet, Judge.

The Court: How did you land on the ground, if you have any recollection of that?

The Witness: I still think I landed like that (indicating), just in the position I am now.

The Court: With your hands out?

The Witness: My hands like that (indicating) and my knees just—whether it was between the two

(Testimony of Joseph John Seamas.)

ties, or whether I hit the edge of the ties I don't recall. When I landed I had my hands and knees down.

The Court: And after you hit the ground the car continued on, did it?

The Witness: Which ones, Judge?

The Court: The car you were on. Did that continue on?

The Witness: That continued on when I was knocked off, yes, sir. [114]

The Court: You had not lost any time before this accident, had you?

The Witness: Once in a while I would lay off to give—we got an extra board.

The Court: No, I mean on sick leave.

The Witness: No, sir, unless the flu or a cold.

The Court: Ordinary routine cold, or things like that?

The Witness: That is all.

The Court: And since 1939, the date of this last accident, did you lose any time on account of injuries or anything of that character?

The Witness: In about 1947.

The Court: What was that injury?

The Witness: That is when the switch stand—the handle flew off and hit me on the side.

The Court: Yes, you referred to that accident?

The Witness: Yes.

The Court: And you have worked continuously, have you, save and except for those occurrences?

The Witness: Yes, sir.

(Testimony of Joseph John Seamas.)

The Court: And since this accident you have not returned to work, have you?

The Witness: No, sir.

The Court: All right, I have no further questions.

Mr. Cummins: Pardon me just a moment, your Honor. [115]

Recross-Examination

By Mr. Cummins:

Q. Mr. Seamas, in 1947, you were off work for a considerable period of time that was not related to any injury, and you were in the Santa Fe Hospital, you were in the Georgia Street Receiving Hospital, Los Angeles, weren't you?

A. That wasn't no injury, sir.

Q. That is right, but you were in the hospital, weren't you?

A. I was ill.

Mr. Cummins: That is all.

The Witness: Can I explain that, sir?

The Court: Yes, you can explain that.

The Witness: During the war, folks, we were so short of men. I am an ex-Marine reserve, wanted to help, do my part. Worked 16 hours a day from 11:00 p.m. until 3:00 o'clock in the afternoon.

Mr. Cummins: Pardon me, Mr. Seamas. Your Honor, I think counsel can argue Mr. Seamas' case for him, but this is the nature of argument.

The Court: It probably is.

Mr. Cummins: And sympathy.

(Testimony of Joseph John Seamas.)

The Court: Did this relate to your hospitalization?

The Witness: Yes, sir.

The Court: All right, then will you go right to the matter [116] of hospitalization? Why were you there, sir?

The Witness: It hit me in 1947. I felt myself breaking down. I didn't want to break down. In the meantime I had domestic troubles. I didn't drink, I didn't go raise the dickens. I have got a child to think of. I got my legitimate rest——

Mr. Cummins: Your Honor, I think this is beyond the scope of reasonable testimony.

The Court: I agree with counsel. These matters naturally arouse sympathy, but at the same time they do not relate directly, Mr. Seamas, to the matters in question. Accordingly, the jury is instructed to disregard the statements of domestic matters and the like. You may step down. Call the next witness, counsel.

(Witness excused.) [117]

SIDNEY ALBERT WEITH

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the Jury.

The Witness: Sidney Albert Weith, 1026 West Cornell, Fresno, California.

(Testimony of Sidney Albert Weith.)

Direct Examination

By Mr. Michael:

Q. Mr. Weith, I will have to ask you to be a little slower because she has to take this down on the machine. Mr. Weith, what is your age at the present time? A. Twenty-three.

Q. What is your occupation?

A. I am a student.

Q. And in what school are you attending?

A. Fresno State College.

Q. By whom were you employed, Mr. Weith, on December 9, 1950? A. Santa Fe Railway.

Q. When did you first go to work for the Santa Fe Railway?

A. About November, middle of November.

Q. Of what year, Mr. Weith?

A. '50—'49.

Q. November, 1950? A. Yes.

Q. How long did you work for the Santa Fe Railroad? [118]

A. Approximately three months.

Q. And have you ever worked for any other railroad, Mr. Weith? A. No.

Q. What was your job with the Santa Fe?

A. I was a switchman.

Q. What did you do? What duties did you perform as a switchman?

A. I was what is known as a pin puller. When the cars are to be uncoupled my job is to pull the lever and—which by means of leverage pulls the pin from the coupling and uncouples the cars.

(Testimony of Sidney Albert Weith.)

Q. And in what yard were you working on December 9th of 1950?

A. Mormon Yards, Stockton.

Q. With whom were you working on that day?

A. Mr. Seamas, Mr. Mahan, and the engineer and fireman, Mr. Strain and Mr. Marrs.

Q. What hours did you work that day?

A. Three p.m. to 11:00 p.m.

Q. Now, calling your attention to the hour of 10:00 or 10:15 p.m., on that day, do you recall whether an accident occurred at the Mormon Yard?

A. Yes.

Q. And how did you know that this accident took place?

A. Mr. Seamas had made comments. [119]

Mr. Cummins: Sorry, I didn't hear that answer, your Honor.

Q. (By Mr. Michael): How did you know that this accident took place?

A. Mr. Seamas told me of that accident.

Q. Is that the only way that you knew that this accident took place? A. Yes.

Q. Now, what was the condition of the weather at that time?

A. It was night, and very foggy. It was spotty fog.

Q. There has been some confusion here as to how far a person can see. Perhaps you can clarify that by explaining a little about tule fog, would you please?

(Testimony of Sidney Albert Weith.)

A. Well, you can be standing in one position——

Mr. Cummins: Objection, unless the question is restricted to the night in question.

Mr. Michael: On December 9th, Mr. Weith.

A. On December 9th it was, well, what has been referred to as a tule fog, which is spotty. At one position you can see some distance, and a few feet away you can't see very far at all. It is a fog that covers to the ground and when you are in it you know it. You can't see very far at all.

Q. Now, just before this accident had happened will you explain what train movements were made by the crew?

A. Well, we took the five cars from the rip track and pulled [120] them back to the lead track for switching to their respective positions in the field.

Q. Then what happened?

A. One car had been kicked down to go to No. 9, and came to rest at the, just beyond what is outlined there as the bull switch.

Q. Is that the only car that was kicked that night, Mr. Weith?

A. No, the next one was to go down to the track at the field, and it couldn't be kicked in there because the one car had followed the lead.

Q. Where did the second car come to rest?

A. I guess it was just going down the line.

Q. At this time who was the engineer?

A. Mr. Strain.

Q. Mr. Strain? A. Yes.

(Testimony of Sidney Albert Weith.)

Q. And where was his position?

A. He was in the engine.

Q. Where was the fireman?

A. He was also in the engine.

Q. Who was acting as engineer at this time?

A. The regular engineer, Mr. Strain.

Q. And what side of the train would he be sitting on, or which side of the engine, excuse me?

A. He would be sitting on the north side of the engine. [121]

Q. That would be the fireman or the engineer sitting on the north side?

A. That would be the engineer that would be sitting on that side.

Q. Where would be the fireman who was operating as the engineer sitting?

A. On the south side, across from him.

Q. On the south side? A. Yes.

Q. Where was the foreman, Mr. Mahan, standing at the time that these two cars had been kicked down?

A. In the general area of the bull switch.

Q. Will you kindly step to this board and indicate on the board the position Mr. Mahan was standing in? Just indicate it with an "M" in colored chalk.

(Witness goes to blackboard.)

Q. Where were you standing, Mr. Weith?

A. Back in here (indicating on blackboard), in the area of the cars here.

(Testimony of Sidney Albert Weith.)

Q. Did you have any one fixed position?

A. No. I had to walk up and down the cars.

Q. And could you indicate a "W" just approximately where you would be standing, the general area.

A. (Drawing on blackboard.)

Q. Are there any other structures in that general area, building or structures of any kind? [122]

A. There was a shanty right about in here (indicating).

Q. Would you mind drawing that in, please?

A. (Drawing on blackboard.)

Q. Is that just south of this bull switch?

A. In there (indicating).

Q. O.K. As you have it diagrammed there, Mr. Mahan would be standing west of you, is that correct?

A. That is right.

Q. And did he have a lantern in his hand at that time?

A. Yes.

Q. Could you see him carrying this lantern?

A. Yes.

Q. Was there anyone standing between you and Mr. Mahan?

A. No.

Q. Did you have a lantern in your hand at that time?

A. Yes.

Q. Was anyone standing beyond Mr. Mahan, that is, to the west—well, it would be southwest of Mr. Mahan, that you saw?

A. No, sir, not that I could see.

Q. Mr. Weith, where was Mr. Seamas working at this time?

(Testimony of Sidney Albert Weith.)

Mr. Cummins: At what time? I think that question should be more definite, your Honor.

Mr. Michael: We are speaking just at the time when the two cars had been kicked and the two cars had come to rest?

A. He was working in the general area of the field and along [123] the switches across the track.

Q. (By Mr. Michael): You stated the first car, marked No. 1, had been kicked back, and then the second car——

A. That is right.

Q. ——had been kicked and the two cars had coupled on together. Was the train backed up after that?

A. Well, it moved. It backed up.

Q. Do you know who gave the signal to the engineer to back that train up?

A. No, sir.

Q. Did you give the signal, Mr. Weith?

A. No.

Q. After the train backed up where was your position, Mr. Weith?

A. In the position that I have on the diagram there.

Q. Were you standing still?

A. Yes. Walking up and down the track there. The diagram is the tail track there.

Q. Do you recall after the train was backed up this tail track, where your position was where you were walking, in what direction?

A. I would be walking west.

Q. As this train approached these two cars which were stopped, was any signal given to slow the train down?

(Testimony of Sidney Albert Weith.)

A. Not to my knowledge. [124]

Q. You didn't see any signal?

A. I didn't see any.

Q. What happened after the train was backed up?

A. Well, it hit into the two cars that were by the bull switch.

Q. And what happened to the two cars?

A. Well, they went on down the track a little ways.

Q. Do you know where they rolled to?

A. Well, the switch was originally lined to go into 9, and they went on down the track.

Q. Do you know in what position they came to rest?

A. I don't know exactly where, no.

Q. Was any signal given to the engineer to stop the train before it struck these two cars?

A. To my knowledge, no.

Q. After Mr. Seamas was injured, Mr. Weith, did you hear any conversation take place between Mr. Mahan and Mr. Seamas?

A. Oh, just a word or two shouted back and forth, but what was said I don't know.

Q. Do you recall what the nature of that conversation was?

A. No, sir.

Q. You don't know—

The Court: Speak just a little louder. I can't hear you and I am sure the jurors can't hear you. Speak up a little louder, please. This is important to both sides. There is nothing to be concerned about. Just speak up a little louder. [125]

(Testimony of Sidney Albert Weith.)

Q. (By Mr. Michael): I said, did you hear what the gist of the conversation was, Mr. Weith, what they were talking about? A. No.

Q. Did you see Mr. Seamas after work?

A. Yes.

Q. Where did you see him? What was the occasion of your seeing him?

A. I rode home with him. I rode into Stockton with him.

Q. What was his physical condition at that time? A. Well, he was feeling pretty bad.

Mr. Michael: That is all. No further questions, your Honor.

Cross-Examination

By Mr. Cummins:

Q. Mr. Weith, this is the first time I have ever spoken to you, isn't it? A. Yes.

Q. We haven't met before, have we, sir?

A. No.

Q. Mr. Anderson has, however, asked you to come in and see me yesterday, didn't he?

A. Yes.

Q. Gave you a pass, gave you some money to pay your expenses, didn't he? A. Yes, sir.

Q. Where did you go? [126]

A. I went at the hotel, sir.

Q. Did you come over to Mr. Baraty's office?

A. No, sir.

Q. Did you go over to see Mr. Michael and Mr. Papas? A. They were in the same hotel.

(Testimony of Sidney Albert Weith.)

Q. Did you see them? A. Yes.

Q. Did you discuss this accident with them?

A. Yes.

Q. Did Mr. Seamas tell you there were two cars here instead of one? A. No.

Q. It was just one car there, wasn't it, that was kicked into No. 9 track? A. Yes.

Q. Just one wasn't it? A. Yes.

Q. There weren't two cars were there, Mr. Weith? That is clear, isn't it?

Mr. Michael: I think—just a minute. I think the witness is a little confused as to the time.

Mr. Cummins: I don't think he is confused.

The Court: I think the witness will explain it. If you have any misconception, tell us about it, or if there was one car or two. [127]

Q. (By Mr. Cummins): There was just one car kicked down here to the No. 9 track, and it didn't go all the way down No. 9, that is accurate thus far, isn't it? A. Yes.

Q. And the entire cut of cars was shoved to a rough coupling against that one car, isn't that the way this happened?

A. There were two cars.

Q. All right. You remember giving a statement, don't you, to Mr. James Anderson, claims agent, on January 5, 1951, Mr. Weith? A. Yes, sir.

Q. Your memory was at least as good about what happened at the giving of your statement as to the events as it is after you have talked with Mr. Seamas and his attorneys, wasn't it?

(Testimony of Sidney Albert Weith.)

A. I have not talked with Mr. Seamas.

Q. Did you talk to his attorneys? A. Yes.

Q. Did his attorneys tell you there were two cars there? A. No, sir.

Q. They didn't, sir? A. No.

Q. They didn't tell you Mr. Seamas testified there were two cars there? A. No, sir. [128]

Mr. Papas: Excuse me, your Honor, we can't listen to his testimony and check this stuff he handed us at the same time.

Mr. Cummins: That is right. I will wait for you.

(Pause.)

The Court: Well, you may proceed, counsel.

Mr. Cummins: I want to use it, your Honor.

The Court: All right, you may use it. Counsel has read it—one of them. If there are any other statements involved in this trial by one side or the other side, I direct they be produced and exchanged so we will not have these interruptions. Do you have any statements, counsel for the plaintiff?

Mr. Papas: I beg your pardon?

The Court: Do you have any statements, or do the defendants have any statements? If you have, interchange them.

Mr. Cummins: This is the only one I will use for impeachment purposes unless another witness is called. If there is, then I will use it.

Q. (By Mr. Cummins): Mr. Weith, this is your signature on the bottom of this page, isn't it?

(Testimony of Sidney Albert Weith.)

A. Yes.

Q. You wrote below it in your handwriting that "I have read the above statement and it is true to the best of my knowledge," didn't you? [129]

A. Yes, sir.

Q. Will you read that statement to yourself, please (handing document to the witness). Doesn't that refresh your memory, Mr. Weith, that there was just one car kicked into the No. 9 track, and that the cut came down against it, the one car?

A. Perhaps.

Q. Thank you. You are sure you heard Mr. Seamas say anything to Mr. Mahan just before this cut of cars hit this one car?

A. Will you ask that again, please?

Q. Are you sure you heard Mr. Mahan or Mr. Seamas say anything to one another just before this alleged accident took place?

A. Just what they said, no.

Q. Did you hear them say anything?

A. Heard them just yell. I didn't pay any attention to what it was. I couldn't hear it.

Q. You don't know who gave the yell, do you?

A. No, sir.

Q. Now, that particular place in that yard is in a little hollow, isn't it, so that frequently when you kick a car in it doesn't roll quite as far as you think it should?

A. That is true.

Q. You don't know whether there was a brake set on that car or not, do you?

A. No, sir. [130]

(Testimony of Sidney Albert Weith.)

Q. Would you keep your voice up, please, so everybody will be sure to hear you?

A. I am sorry.

Q. Thanks. Now, how far from Mr. Mahan were you at the time these cars came together—that second kick came, in other words, the last kick move?

A. Oh, three, or four, five car lengths.

Q. Kind of foggy and damp? A. Yes, sir.

Q. How far could you see?

A. As I explained before, about in one position you could see four or five, maybe six cars, and another position you couldn't see only about half that far.

Q. Where was Mr. Seamas just before this last kick move was made? A. In the field.

Q. Do you know where he was?

A. No, sir.

Q. Did you see him? A. No, sir.

Q. Mr. Weith, when you stated here, "Foreman Mahan was working close to me, and when this car did not roll into the clear he gave the engineer a 'come ahead' signal with the intention of giving the car another kick," you were referring there to just one car, weren't you? [131] A. Yes.

Q. There was just one car there, wasn't there, Mr. Weith? A. There was one car to go to 9.

Q. And that is the only one that had been kicked down that track before this claimed injury took place, isn't that true?

A. No, there was another car, too, behind him.

(Testimony of Sidney Albert Weith.)

Q. You didn't say so in your statement anywhere, did you?

A. No, sir. I didn't write the statement.

Q. You gave it to Mr. Anderson, didn't you?

A. Yes.

Q. And you read it? A. Yes.

Q. And you signed it? A. Yes.

Q. Then you stated further, "I judge our cut had to go about three car lengths before it contacted this car which had not rolled into the clear." You were referring to just one car there, too, weren't you?

A. I was referring to the coupling that we were to make.

Mr. Michael: Speak up just a little bit, Mr. Weith.

Q. (By Mr. Cummins): Does that not refresh your memory that there was just one car there and not two? A. I believe there were two cars.

Q. Do you know?

A. Fairly certain, yes. [132]

Q. You didn't see Mr. Seamas after you made that first kick of a car down to the No. 9 track, did you, sir? A. No.

Q. And you didn't see any light or any reflection from a light anywhere about either the one or the two cars that were here (indicating on blackboard), on which Mr. Seamas claimed he climbed to?

A. Mr. Mahan was in that area.

Q. You didn't see any light on the top of the cars or on the other side, north side of the cars—these

(Testimony of Sidney Albert Weith.)

two cars or this one car, did you? A. No, sir.

Q. And you didn't see any reflection from any light in that vicinity either, did you, sir?

A. No, sir. I was working close to the south side of this—of these cars.

Q. You had no idea Mr. Seamas was on either one or two cars here, did you? A. No, sir.

Q. When did you next see Mr. Seamas?

A. Well, it was on the way back to the shanty where we logged in and out.

Q. Did he tell you he had been hurt?

A. He made some statement as to it.

Q. What did he say? [133]

A. Well, he said he was sore.

Q. Did he tell you his back was hurt?

A. No, sir.

Q. At no time before at least the time that you left the yards of the railroad did Mr. Seamas tell you his back was hurt, did he?

A. No, he didn't specify any part of his body.

Mr. Cummins: Your Honor, I ask that the state-
of Mr. Weith be marked and admitted into evidence.

The Court: It may be marked in evidence.

(Statement of Mr. Weith was admitted into
evidence and marked Defendant's Exhibit A.)

The Court: We will take the noon recess and re-
sume at 2:15—fifteen minutes past two.

Same admonition to you.

(Thereupon a recess was taken until 2:15
o'clock p.m. of the same day.) [134]

Tuesday, October 2, 1951—2:15 P.M.

SIDNEY ALBERT WEITH

called as a witness on behalf of the plaintiff, resumed the stand, previously sworn.

Cross-Examination
(Continued)

By Mr. Cummins:

Q. Mr. Weith, you were in the courtroom this morning, were you not? A. Yes, sir.

Q. While Mr. Seamas was testifying?

A. Yes, sir.

Q. You talked with the attorneys during the lunch hour, have you? A. I said "Hello."

Q. Anything else? A. No.

Q. O. K.

Mr. Cummins: May I have the exhibit—I don't know what the number is. The last one. Your Honor, I would like to read Mr. Weith's statement to the jury at this time. It is defendant's exhibit A. May I suggest to the Court and counsel that I will skip the printed matter on the form.

It is the statement of S. A. Weith, made to J. R. Anderson at Fresno, California, the 5th day of January, 1951.

"My name is S. A. Weith, age 23 years. I reside at 1026 West Cornell, Fresno. I am a yard helper by occupation. Am single. I have worked at the Santa Fe [135] Railway Company about two months.

"On December 9, 1950, I was a helper with yard

(Testimony of Sidney Albert Weith.)

engine No. 2351, the time of accident to helper J. J. Seamas. Our engine was pointed toward the east and we had a cut of five or six cars at the rear of the west end which we had just brought out of the rip track. We were working on east lead and had an end car or most westerly car on cut to be put into No. 9 track. When we got into No. 9 track we gave it a kick, and I pulled the pin, but for some reason the car did not roll into the clear, evidently due to a handbrake sticking.

“At the time we kicked this car Seamas with a lighted lantern was about three car lengths farther west along No. 9 track. The night was foggy and damp, a white ground fog that limited visibility to about four or five car lengths.

“After I pulled the pin on this car I did not see Seamas again and I do not know where he was when the next follow up move was made. I did not know what he was doing. Foreman Mahan was working close to me, and when this car did not roll into the clear he gave the engineer a ‘come ahead’ sign with the intention of giving the car another kick. I judge our cut had to go about three car lengths before it [136] contacted this car which had not rolled into the clear.

“I cannot say how fast the cut was going when impact took place with the car we wanted to kick into the No. 9 track, but it was an unusually hard coupling and one that would have required a person on the car to have a very tight and firm hold to prevent his being knocked off.

(Testimony of Sidney Albert Weith.)

“As before indicated, when I last saw Seamas before this last move was made, he was on the opposite side of the track from where we were working, and after we made the first kick of the car to No. 9 track I did not see him any more. I could see the end car before we made second contact with it, and I did not see the lantern or reflection of a light on the end or brake end of the car and I had no idea Seamas was on it. Our moves were all made in a westerly direction and the brake on this end car was on the west end of the car. I had no personal knowledge Seamas was on the car when we kicked it or at any other time.

“The next time I saw Seamas following the last kick of the car into No. 9 track was when I was going down No. 10 track with the engine, when he and Mahan walked over and got on the footboard. Seamas was rubbing his leg and said he had bumped it. Mahan [137] asked him if he was hurt and he said it was nothing. After we were tied up and in the yard office Seamas told me he had been on the brake platform of the car when we made the move for the second kick, and the impact had knocked him to the ground. But, as is stated before, I did not see him or his lantern on the car and have no knowledge outside the statement made by Seamas himself that he was on it.

“I have read the above statement and it is true to the best of my knowledge.

“SID A. WEITH.

“Witness,

“J. R. ANDERSON.”

(Testimony of Sidney Albert Weith.)

Q. (By Mr. Cummins): Mr. Weith, could you tell us, how long is it that you have been a switchman? A. Three months.

Q. Are you familiar with the operation of an Ajax brake? A. Yes, sir.

Q. Do you know, sir, that you are able to operate an Ajax brake, release it, simply by pulling a lever?

A. Yes, sir.

Q. You don't have to crawl up on the brake platform to do that, do you? A. No, sir.

Q. You can release it with a very easy touch from the side ladder of the car, can't you, sir? [138]

A. Not always.

Q. Well, generally? A. Generally.

Q. And you can also release it from the catwalk on the top of the car by simply moving it without going down on the brake platform at all, can you not? A. It is possible.

Mr. Cummins: That finishes my cross-examination.

Redirect Examination

By Mr. Michael:

Q. Mr. Weith, in releasing these Ajax brakes on these cars, if a brake is stuck or is jammed against the wheel can it be released by merely flipping a lever?

Mr. Cummins: Objection. There is no evidence in this case that the brake was stuck.

The Court: Overruled. That might be answered

(Testimony of Sidney Albert Weith.)

as a hypothetical question. You might answer it, please.

A. Well, it isn't always a rule that it can be released by just merely flipping it, and I know you want to hold on with one hand and get a grip on it. Personally I wouldn't release a brake from that position, from the end of the car and just lean over.

Q. Unless you stepped over to the brake platform?
A. That is right.

Q. If you were to release a brake from the top of a car, [139] wouldn't that entail getting down on your knees and bending over to raise the lever?

Mr. Cummins: Objection. Leading and suggestive.

The Court: Overruled.

Mr. Michael: You may answer.

A. Yes, you would have to get down on your knees to release it.

Mr. Michael: May I see the exhibit, please?

Q. Mr. Weith, calling your attention to this statement that has been introduced in evidence, who took this statement from you?

A. Mr. Anderson.

Q. And who is Mr. Anderson? What does he do?

A. He is the claims adjustor for the Sante Fe Railroad.

Q. I notice that this statement is typed out. Did you type it out?
A. No, sir.

Q. Who typed the statement out?

A. Mr. Anderson.

(Testimony of Sidney Albert Weith.)

Q. And did he type it out at the time you gave him the statement? A. Yes, sir.

Q. And is the statement typed out word for word as you gave it to Mr. Anderson?

A. No, sir. [140]

Q. What does this statement reflect? The gist of the conversation that you had with Mr. Anderson?

Mr. Cummins: That is a conclusion, your Honor. Object to that, leading and suggestive; further, incompetent and an opinion of the witness.

The Court: Overruled.

Mr. Michael: You may answer, Mr. Weith.

A. Will you repeat the question again, please?

Mr. Michael: Will you read the question back, Mr. Reporter, please?

(Question read by the reporter.)

A. Yes.

Q. (By Mr. Michael): Did Mr. Anderson ever ask you whether one or two cars were kicked?

A. Directly, I don't remember.

Q. You don't remember? Now, you were subpoenaed to testify today, is that correct?

A. That is right.

Q. And you were subpoenaed on behalf of Mr. Seamas? A. That is right.

Q. And I contacted you and asked you to come up and testify on his behalf?

A. That is correct.

Mr. Michael: I think that is all I have, your Honor. [141]

(Testimony of Sidney Albert Weith.)

Recross-Examination

By Mr. Cummins:

Q. Mr. Weith, do you really mean you have to get down on your hands and knees on a catwalk of a car to release an Ajax brake? A. Yes, sir.

Q. You have had three months experience as a switchman? A. Yes, sir.

Q. Is there anything in this statement that is false (handing document to the witness)?

A. I don't believe there is.

Mr. Cummins: Thank you. That is all the questions I have. Thank you, sir.

(Witness excused.)

Mr. Papas: I would like to call Mr. Strain as the next witness for the plaintiff, your Honor.

MILTON G. STRAIN

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. Milton G. Strain, Marin City; House 162; Locomotive fireman for the Northwestern Pacific.

Direct Examination

By Mr. Papas:

Q. Mr. Strain, how long have you been employed by the Northwestern Pacific Railroad? [142]

(Testimony of Milton G. Strain.)

A. Oh, approximately about four and one-half, maybe five months.

Q. About five months?

A. Something like that.

Q. Do you recall when you went to work for that company?

A. I think it was June the 5th.

Q. Of this year?

A. Yes.

Q. Were you employed—where were you employed prior to that time, Mr. Strain?

A. Santa Fe.

Q. Would you be good enough to tell us when you first began working for the Santa Fe Railroad?

A. In July, 1946.

Q. And you worked continuously for the Santa Fe Railroad from July, 1946, until June of this year, is that correct?

A. Yes, off and on.

Q. Were you working on the extra board?

A. Yes.

Q. I see. In what capacity were you working for the Santa Fe Railroad Company from 1946 until June of this year?

A. Locomotive fireman.

Q. Locomotive fireman?

A. Yes.

Q. Mr. Strain, I know most of us have very little knowledge [143] about what firemen do on a locomotive. Would you be good enough to tell us in a general way just what you do as a locomotive fireman?

A. Well, it is just more or less to keep—be on the lookout for signals on your side, that anything that comes up, or just in general be on the lookout. On a steam engine he has to keep the water and the

(Testimony of Milton G. Strain.)

steam and his side of the engine going along with keeping on the lookout.

Q. I take it you help the engineer as well?

A. Yes.

Q. May I ask you, Mr. Strain if you were employed by the Santa Fe Railroad Company on December 9, 1950?

A. Yes, I was.

Q. Were you employed in the capacity of a locomotive fireman?

A. Yes.

Q. And did you go to work on that day?

A. Yes, I did.

Q. Where did you go to work, Mr. Strain?

A. At the Mormon yards in Stockton.

Q. Is that a fairly large yard as railroad yards go?

A. Well, to a certain extent it is.

Q. I see. Mr. Strain, I don't know whether you have seen this diagram on the board or not. We have drawn a diagram on the board which purports to show in a general way the track layout at the Mormon yard. Does that refresh your recollection as [144] to the track layout there?

A. Yes.

Q. Is there a curve at this point (indicating on diagram)?

A. Yes.

Q. And is there a curve later on on this track that is designated as a tail track?

A. Yes, there is.

Q. Is this area straight for a certain distance?

A. Yes.

Q. Mr. Strain, would you be good enough to tell us what time you went to work on December 9th, of 1950?

(Testimony of Milton G. Strain.)

A. I think it was the 3:59 switch engine.

Q. Were you working with a crew?

A. Yes.

Q. With a group of other men, I mean?

A. Yes.

Q. Would you be good enough to tell us who the other men were?

A. Mr. Marrs was engineer. Mr. Mahan was foreman. Joe Seamas was a helper and Mr. Weith was the pinpuller.

Q. And, Mr. Strain, what did you do after you went to work, that is, that afternoon? Did you work around this general area?

A. Yes, just around the general yards.

Q. Switching cars? A. Yes.

Q. Did you move certain cars from one track to another? [145]

A. Yes, that is what switching is.

Q. What was the weather like when you went to work at approximately 3:59 that afternoon?

A. As far as I remember it was clear.

Q. Clear? A. Yes.

Q. Was the sun out? A. I think it was.

Q. Did you have occasion to go to dinner that night—that day? A. Yes.

Q. Approximately what time did you go to dinner, Mr. Strain?

A. That I can't say now. It is too long ago.

Q. After you went to dinner did you begin working again? A. Yes.

Q. And do you recall after having had dinner

(Testimony of Milton G. Strain.)

whether you went to the area designated on the blackboard as a rip track for the purpose of picking up some cars?

A. Yes, we went to the rip track to pick up cars.

Q. Do you recall how many cars it was you picked up there, Mr. Strain?

A. No, I don't. It is too long ago. It was too dark.

Q. May I ask you what your position was on the locomotive, on the engine?

A. I was running it at the time. [146]

Q. You were running it? A. Yes.

Q. In which direction was the engine facing?

A. East.

Q. It was facing east? A. Yes.

Q. By that you mean the head of the engine was facing in this general direction (indicating), is that correct? A. Yes.

Q. And you had hold of another five cars on the rear of the engine? A. Yes.

Q. Did you proceed, then, in an easterly direction or northeasterly direction?

A. Yes, that is right.

Q. I take it by that time it was dark?

A. Oh, yes.

Q. Was it fairly dark?

A. It was dark, black.

Q. What were generally the conditions of the weather?

A. Well, just fog here and fog there; just a tule fog.

(Testimony of Milton G. Strain.)

Q. I see. Is that area where the Mormon yard is situated known for the fog which it receives?

A. Yes, that end of the yard is.

Q. Can you tell us whether that is situated in a pocket? [147]

A. Yes, that end of the yard is.

Q. Mr. Strain, as you proceeded along this track designated on the board as the lead track, on which side of the engine were you?

A. Let's see, I was on the right side of the engine.

Q. On the right side? A. Yes, sir.

Q. I see. In other words, then, the head of the engine is in this direction and you were over on the right side? A. Yes.

Q. Pertaining to the head of the engine, is that right? A. Yes.

Q. Who was opposite you?

A. The engineer.

Q. What were his duties?

A. It would be the same as mine.

Q. You changed places with him, in other words?

A. Yes.

Q. May I ask, just as a general information, is that customary for the purpose of training the fireman to become an engineer? A. Yes, it is.

Q. Thank you. And, Mr. Strain, we have an "X" marked on here and an "M" below it, and is designated as the bull switch. Is there also a switch at this point designated as No. 7 switch point? [148]

A. As far as I remember, there is.

(Testimony of Milton G. Strain.)

Q. There is.

Mr. Papas: Can we mark that, your Honor?

Q. Now, Mr. Strain, as you proceeded in this general direction, northeasterly direction, were the other members of the crew, if you can recollect, with you or near you?

A. Well, they were out on the cars.

Q. They were on the cars? A. Yes.

Q. Could you see them, or could you see their lights? A. No, just see their lights.

Q. You couldn't see them? A. No.

Q. You wouldn't be able to tell us whether Mr. Seamas or Mr. Weith or Mr. Mahan were at the middle or tail or near the engine? A. No.

Q. All you could see was their lights?

A. That is right.

Q. Mr. Strain, when you approached the area of what is designated on this blackboard as No. 9 switch point, did you slow down?

A. Yes, because I seen a man drop off.

Q. You saw a man drop off?

A. Yes. [149]

Q. Did you know who that man was?

A. No.

Q. Was it the man that was at the end of the five—the string of cars you had hold of?

A. I think he was the last man.

Q. Were you able to see him or movements which he made after he got off at that point?

A. No, sir.

Q. You were not? Did you know at that time

(Testimony of Milton G. Strain.)

what this man was doing? A. No, I didn't.

Q. Do you at any time when you are on the engine know what the other men of the crew are doing?

A. Once in a while if we have the time we may explain what moves we are going to make and how they are to move.

Q. How do you generally get your instructions?

A. By signal.

Q. It is a hand signal during the day?

A. Yes.

Q. And you use a light during the night?

A. Yes.

Q. Mr. Strain, did you go up along this back lead on that tail track after this man whose light you saw got off at this point? A. Yes. [150]

Q. Would you be good enough to tell us approximately how far you traveled in an easterly direction on this tail track after you passed the bull switch?

A. That is hard to say because it was a black night and I was more or less following lights. Just keep going until you get your signal and stop, so I couldn't say how far back we did go on the back track.

Q. You couldn't tell us whether it was three or four or five car lengths?

A. Not from the switch. It was too dark. I do know we went back on the back track quite a ways.

Q. You went quite a ways in this direction?

(Testimony of Milton G. Strain.)

A. Yes.

Q. Did you receive a stop signal after you got to this point? A. Yes.

Q. Do you recall who gave you that stop signal?

A. No.

Q. May I ask, for a matter of information, who generally gives the signals on the crew?

A. The foreman.

Q. The foreman? A. Yes.

Q. And do any of the other members of the crew occasionally give the signals?

A. Oh, yes. [151]

Q. And who are the other members of the crew that might give a signal?

A. Well, the field man can give them, or the pinpuller. Whenever you get a cut of cars, the pinpuller might signal or run the car into one of the cuts to be pushed, and the foreman, he gives the signal, grabs hold of the last one, backs that cut of cars.

Q. Mr. Strain, do you recall whether you saw anyone get off at that bull switch, off the string of cars you had there?

A. Yes, I am pretty sure a man got off at the bull switch.

Q. Did anyone else get off as you pulled easterly on the tail track?

A. Yes, there was another light up by the cars.

Q. Could you tell us approximately how far apart these were? A. No, I cant.

Q. We realize it was dark and foggy. Now, Mr.

(Testimony of Milton G. Strain.)

Strain, after these two men got off you did receive a stop signal? A. Yes.

Q. Who was the man who gave you this stop signal? A. The man at the switch.

Q. The man at the switch? You mean the bull switch? A. Yes.

Q. You don't know who that man was?

A. No.

Q. Will you tell us, is it customary to have the foreman at [152] the bull switch, if you know, or is it customary to have some other member of the crew at that point?

A. It is customary for the foreman, unless he is breaking in a pinpuller or field man in to being a foreman.

Q. Is the position of the pinpuller between the foreman and the engine? A. Yes.

Q. What is the purpose of that, Mr. Strain, would you be good enough to tell us?

A. That is in case we were kicking cars out some place, the pinpuller is there to release the cars, pull the pin to release the cars.

Q. I see. And after you stopped on the tail track, did you receive a signal to kick a car?

A. Yes, I did.

Q. Mr. Strain, which one of these men gave you that kick signal? A. The man at the switch.

Q. The man at the switch? A. Yes.

Q. Was that signal relayed to you by the man between the switch point and the engine?

A. I can't recall whether it was or not.

(Testimony of Milton G. Strain.)

Q. You can't recall? Very well. Now, we have a lantern here which has been introduced in evidence, that is customarily used [153] by railroad men, is that correct? A. Yes.

Q. You recognize this? A. Yes, I do.

Q. And I know that most of us—at least I don't know the type of signal you get for the kicking of a car. Would you be good enough to show us, please? (Handing lantern to the witness.)

A. It is just like this, if you are backing up (demonstrating), or down fast like this for a go ahead kick.

Q. After you received this kick signal, what did you do? A. I kicked.

Q. You kicked the car? A. Yes.

Q. By that you mean you started to back, and after having received sufficient momentum, why, the pinpuller lifted the pin and the car was released?

A. Yes, that is right.

Q. Did you know where that last car, or the westerly most car, was going to?

A. To my knowledge, no.

Q. You did not? That you don't know?

A. That's right.

Q. And were you able to see how far that first car that was kicked traveled? [154]

A. No, sir.

Q. You couldn't see it? A. No.

Q. I see. Now, Mr. Strain, to clarify one point further, at or near this No. 7 switch point is there

(Testimony of Milton G. Strain.)

some sort of a structure, wooden structure near there?

A. Yes, there is a switch shanty up there.

Q. Is that where this rectangle or square shaped marking is on the blackboard?

A. Yes, about that.

Q. Is that about the place it is located?

A. Yes.

Q. This was a shanty? A. Yes.

Q. What is that place used for, Mr. Strain?

A. Oh, for switchmen to go in out of the rain when they are getting a switch list, or the yard-master is talking to them on the telephone.

Q. Does that shanty have a light in it?

A. No.

Q. Does it have a telephone? A. Yes.

Q. After that first car was kicked, Mr. Strain, I take it that you moved on or you backed a little closer to the bull switch? [155]

A. Yes, that is right.

Q. And did you then move forward again?

A. I can't recall whether we did or not.

Q. Did you receive—after kicking this first car, did you receive another signal?

Mr. Cummins: Pardon me, Mr. Papas. I am going to object to that question, to the use of the term "after you kicked this first car." This witness has not testified there was any first or second or third car that was kicked. He wouldn't know because he personally was not able to see anything but a lantern. The attorney is therefore stating

(Testimony of Milton G. Strain.)

something not in evidence in this witness' testimony.

Mr. Papas: I will rephrase the question, your Honor.

Q. Mr. Strain, after you received that first kick signal from the man at the bull switch, were you able to tell whether or not the car was released?

A. No.

Q. You were not? A. No.

Q. I see. Then after that signal was given to you, was there any other signal given to you?

A. I think I got another kick signal after that.

Q. You got another kick signal after that?

A. I am pretty sure I did.

Q. Do you recall after having received the second kick [156] signal whether you started to back up for the purpose of kicking another car?

A. Yes, I did.

Q. And do you know whether or not that car was released from the string of cars that you had?

A. No; I don't.

Q. After having received that second kick signal, I take it that you moved a little closer to the bull switch? A. Yes.

Q. Can you tell us how far, after having received that second kick signal and starting to back up, you were from the bull switch?

A. I couldn't say now. It has been too long ago.

Q. I see. Mr. Strain, after you receive the kick signal and the car is kicked, do you then receive a stop signal? A. Yes.

(Testimony of Milton G. Strain.)

Q. Do you recall, after having received the first kick signal, whether you received a stop signal?

A. Yes, I received a stop signal at both signals.

Q. Did that mean anything to you?

A. To stop.

Q. To stop? Well, after having received a stop signal were you of the opinion that the car had been released?

Mr. Cummins: Objection. Incompetent.

The Court: Overruled. [157]

Q. (By Mr. Papas): You may answer, please.

A. Yes, I taken it for granted they had been released.

Q. After having received the second kick signal and starting to back up, did you then receive a stop signal? A. After the second kick signal?

Q. Yes, sir. A. Yes, sir.

Q. What did that indicate to you?

A. To stop.

Q. Did you have any—did you believe the car had been released? A. Yes.

Q. Did you have any reason to believe otherwise?

A. No.

Q. Mr. Strain, after you had received the second stop signal were you able to see a light of the man between the bull switch and the engine?

A. Yes, I saw him at all times.

Q. You saw him at all times? A. Yes.

Q. Is it customary when working in this yard to have the men working in the southern part of this track? A. Yes.

(Testimony of Milton G. Strain.)

Q. Is that purpose, the purpose of that being to have the men visible to the engineer at all times, is that correct? [158] A. That is right.

Q. Well now, Mr. Strain, did you after having stopped the second time receive a back-up signal?

A. Yes, I did.

Q. I see. Now, just before you received that back-up signal were you delayed for any length of time in this area?

A. Well, it wasn't exceptionally long, no.

Q. Were you able to see if there was more than one light here at the bullswitch? A. No.

Q. You still could see that one light?

A. Oh, yes.

Q. You didn't know who the man was?

A. No.

Q. Did you see the light at any time of any employee or crewman in this area (indicating)?

A. I can't see over there.

Q. In other words, from this position you can't see out here, is that right?

A. From clear back at the back track I can for a certain length of ways.

Q. Mr. Strain, after you received the back-up signal did you begin to back up? A. Yes.

Q. And who gave you that back-up signal? [159]

A. The second lantern from me.

Q. By that do you mean the man that you said was over near the bull switch?

A. Yes, that's right.

(Testimony of Milton G. Strain.)

Q. And you say you don't know who that person was? A. No, sir.

Q. Did you assume it was a member of the crew?

A. Yes.

Q. And now after having received this back-up signal from the man at the bull switch, can you tell us whether you saw the man at the bull switch leave that stand?

A. If I am not mistaken he walked away a little ways.

Q. He walked away? A. Yes.

Q. Could you tell whether he was backing up or going forward? A. No, I couldn't.

Q. Could you see the shanty from where you were?

A. I think I could see the outline of it just dimly.

Q. You could see it dimly? A. Yes.

Q. Where did you feel this man was going?

A. I couldn't say.

Q. Did he start to walk toward the shanty?

A. That is what the light indicated.

Q. Now, what happened after you backed up, Mr. Strain? [160]

A. We rammed into something hard.

Q. You ran into something hard? A. Yes.

Q. Can you tell us by looking at the picture on the blackboard approximately where you rammed into something hard?

A. It would be about on the second switch.

Q. By the second switch?

(Testimony of Milton G. Strain.)

A. Yes, the first switch past the bull switch there.

Q. The first switch past the bull switch?

A. Yes.

Q. By that do you mean it was on the back lead track or on the lead track?

A. I couldn't say. It was too dark.

Q. Did you hit quite hard, Mr. Strain?

A. Yes, we did.

Q. Do you recall whether or not you coupled onto any car or cars? A. No, I can't say.

Q. Were you able to see whether or not any cars rammed into something hard?

A. No, I couldn't.

Q. Were you aware that Mr. Seamas was in the area of that first car that you had kicked, Mr. Strain? A. No, I wasn't.

Q. I see. Can you tell us approximately, if you can [161] recollect, how fast you were backing up when you hit something hard?

A. Well, I wasn't going very fast because I got a "slow-easy" signal to back up. Maybe three or four miles an hour.

Q. Mr. Strain, when you hit something hard at this point designated, as you say, the No. 7 switch point, did you then receive a stop signal?

A. Yes, I did.

Q. Was that an easy stop signal or violent?

A. Violent.

Q. Do you recall which one of these men gave you that violent stop signal?

(Testimony of Milton G. Strain.)

A. If I am not mistaken, I got the signal from both lanterns down there at the same time.

Q. From both lanterns at the same time?

A. I think so.

Q. Now, were you aware of the object that you had come up against? A. No.

Q. When did you next see Mr. Seamas, Mr. Strain? A. It was down at the switch shanty.

Q. At the switch shanty? A. Yes.

Q. Going back a moment, might I ask you this: I take it that you have had some experience in running an engine. A. I have a little. [162]

Q. And I take it that you have received some instructions as to how an engine should be run?

A. Yes, that is right.

Q. And I take it you have received signals by light from the foreman and from the other members of the crew as to what to do?

A. Yes, that's right.

Q. Would you be good enough to tell us, Mr. Strain, that when you back up for the purpose of making a coupling, is there a custom of stopping just before——

Mr. Cummins (Interposing): Objection, leading and suggestive.

Mr. Papas: May I finish the question first, your Honor?

Q. ——of stopping just before the coupling is made?

Mr. Cummins: Objection.

A. That is the custom. That is habit.

(Testimony of Milton G. Strain.)

Mr. Cummins: Objection, leading and suggestive; and also I ask your Honor not to permit the same question to be asked until some other questions have been asked, because the witness is fully informed and——

Mr. Papas: Your Honor, he has been employed by the Sante Fe for a period of time, has operated an engine, he has received signals from other members of the crew on many occasions. He can tell us what the custom is as to coupling on to other cars.

The Court: All right, I will admit it. [163]

Mr. Papas: You may answer, Mr. Strain.

A. Yes, that is a custom.

Q. Is it a custom to receive a stop signal just before the coupling is made? A. Yes.

Mr. Cummins: Objection.

The Court: Overruled.

Q. (By Mr. Papas): Is there any other signal that might be given, sir?

A. Well, an easy signal.

Q. Easy signal? A. Yes.

Q. Will you be good enough to demonstrate to us what that easy signal is and what the stop signal is?

Mr. Papas: May I approach the witness, your Honor? Thank you.

A. It is approximately, get maybe three, two and one half car lengths from the cut of cars, the switchman will raise his lantern like this (demonstrating) and as you get closer he will keep giving you the signal like that, and just before you tie in to it he

(Testimony of Milton G. Strain.)

will give you a stop signal. That is to give you time for your slack to run out and you make an easy joining.

Q. Did you receive an easy signal, Mr. Strain?

A. No, I didn't.

Q. Did you receive a stop signal before you banged into [164] something hard?

A. No, sir.

Q. You stated you received the signal after you had made the impact? A. Yes.

Mr. Cummins: Asked and answered.

Mr. Papas: May I have a recess at this time, your Honor?

The Court: We will take the afternoon recess, ladies and gentlemen. Same admonition to you not to discuss the case under any conditions and not to form an opinion until it is submitted to you.

(Recess.) [165]

Mr. Papas: May we proceed, your Honor?

The Court: Yes.

Q. (By Mr. Papas): Mr. Strain, after you hit something very hard you stated that you stopped. Would you be good enough to tell us, if you can remember, approximately where you stopped?

A. It was on the outside of that bull switch—I can't say how many cars, or how close they were at all.

Q. But it was in this general area, the general area of the bull switch? A. Yes, sir.

Q. What did you do then, Mr. Strain?

(Testimony of Milton G. Strain.)

A. As far as I remember, we went ahead and finished our work.

Q. Do you recall whether or not you came down this back lead for the purpose of picking up another car?

A. I can't say whether we did or not. It has been too long ago.

Q. I see. Now, do you recall whether you heard a bang in the area where these two cars are marked? A. No.

Q. You don't recall that? A. No, I don't.

Q. Mr. Strain, may I ask you from the position that Mr. Marrs was in could he see in the area designated as the back of the lead track?

A. No, he couldn't.

Q. He could not. Now, Mr. Strain, when did you then see Mr. Seamas? [166]

A. It was down at the shanty.

Q. At the switch shanty? A. Yes.

Q. How soon after you say you had this collision or this violent banging did you stop working?

A. Oh, maybe 30, 45 minutes.

Q. And I take it that you saw Mr. Seamas at the switchman's shanty after you had finished working? A. Yes, that is right.

Q. Do you recall what time it was when you did finish working? A. No, I don't.

Q. Were the other members of the crew at the switchmen's shanty?

A. Yes, I think they were.

Q. Mr. Marrs was there? A. Yes.

(Testimony of Milton G. Strain.)

Q. Mr. Mahan was there? A. Yes.

Q. And was Mr. Seamas there?

A. Yes, he was.

Q. Mr. Weith? A. Yes.

Q. And was anyone else there besides yourself and these men?

A. Well, I think there was another crew there. Either they were tying up, or else getting ready to go to work. [167]

Q. Did you have a conversation with Mr. Seamas about this violent banging that took place?

A. If I ain't mistaken, I think he made some remark, "What are you trying to do, get rid of me?" or something like that, and then he showed me his legs where it was all skinned up.

Q. Were both legs skinned up?

A. I can't recall, but I knowed he showed me one of his legs that were skinned.

Q. Did he make any complaints to you about any injuries besides the legs that he may have sustained?

A. Well, he was saying that he felt pretty punk, that he would wait until tomorrow to see how it turned out, see how he felt before he made out his accident report.

Q. And it is customary to make an accident report immediately after an accident?

A. As soon as possible.

Q. I see. Do you recall whether or not the Interstate Commerce Commission from your knowledge requires that an accident report be made out?

(Testimony of Milton G. Strain.)

A. I think they do.

Q. Is there a considerable amount of paper work, if you know, connected with the making of an accident report?

A. Well, we have to make out three copies of it.

Q. I see. Does the company encourage or discourage the making of these accident reports? [168]

A. Encourages—

Mr. Cummins: I object to that.

The Court: Objection sustained.

Mr. Papas: Very well, your Honor.

Q. Mr. Strain, did you see Mr. Seamas after you saw him at the switchman's shanty?

A. No, I didn't.

Q. Did you talk to Mr. Mahan? A. No.

Q. Did you talk to Mr. Marrs?

A. I can't recall whether I did or not, but I know I seen Mr. Marrs after the accident.

Q. Mr. Strain, I take it that you have talked to Mr. Anderson?

A. I think I have. It has been so long ago that I have forgotten. I believe it was.

Q. And I take it that he asked you if you knew anything about the accident?

A. He must have.

Q. And do you recall whether or not you made a statement to him concerning the accident?

A. No, sir, I don't, to be frank with you.

Q. You don't remember? A. No, sir.

Q. Is it possible that you may have made a statement to him?

(Testimony of Milton G. Strain.)

A. I could have, but in the length of time that has elapsed [169] between it I have more or less forgot about the accident that Seamas had. It more or less passed out of my mind.

Q. Of course you talked to me about what you knew about the accident, is that correct?

A. Yes, that is correct.

Q. And Mr. Michael was there, and I was there when you talked to us about it? A. Yes.

Q. We have never told you that you were going to be paid for coming here, have we? A. No.

Q. And may we ask you, you were subpoenaed to come here? A. Yes, I was.

Mr. Papas: No further questions. You may cross-examine.

Cross-Examination

By Mr. Cummins:

Q. Mr. Strain, you mentioned when Mr. Papas asked you one particular question in regards to Mr. Mahan or the man standing at what has been termed the bull switch on Exhibit 3, he asked you if you saw that man walk toward the switch shanty or the shanty there on Exhibit 3, and you answered, "If I am not mistaken, he did."

A. That is right.

Q. Might you be mistaken? A. No.

Q. You don't think so? [170]

A. I know I am not.

Q. That is just a manner of speaking on your part then, sir? A. Yes.

(Testimony of Milton G. Strain.)

Q. You meant to say, "Yes, he did walk toward the shanty," is that right?

A. He started to walk away from the switch.

Q. Now, how far was the lantern near the bull switch from the other lantern that you saw?

A. I don't know.

Q. You have no idea?

A. No, sir, it was too dark.

Q. Did you say that just before this impact took place you were operating on a slow signal?

A. That is right.

Q. How fast were you going?

A. Approximately two, three, four miles an hour.

Q. You have operating instructions, don't you, on how fast it is permissible to hit a car when you are coupling them together or kicking them?

A. There have been instructions out.

Q. Those instructions are not to exceed approximately five miles per hour, aren't they?

A. I think it is four.

Q. Four? A. Yes, sir. [171]

Q. In other words, if you hit a car at more than four miles per hour you are liable to do damage to someone on a car? A. That is right.

Q. Or the lading in the car? A. Yes.

Q. So as a matter of practice and custom as well as instructions, you, as a fireman when you operate an engine undertake and attempt to always keep under four miles per hour?

A. That is right.

(Testimony of Milton G. Strain.)

Q. And in this case just before you made contact with that car which you have termed very violent, you were going how fast?

A. Between two to four miles per hour?

Q. Is that very violent?

A. It is when you hit something that is stopped.

Q. It has been nine months since this accident happened, hasn't it?

A. I guess so. I never counted them back.

Q. Well, December 9th until the present date. Is your memory clear on exactly the moves you made leading up to this coupling when you kicked this back car? A. Pretty clear.

Q. Do you think it was any clearer two or three weeks after the accident took place?

A. I think so.

Mr. Cummins: May the record show, your Honor, that I have [172] already showed this particular statement to counsel before the recess—well, before the recess when they first started questioning the witness.

Q. (By Mr. Cummins): Is this your signature, Mr. Strain? A. Uh-huh.

Q. Is that your writing above it to the effect, "I have read the above two pages and as far as I can recall this statement is true and correct"?

A. The statement I signed?

Q. Yes. You want to look at both pages? I am going to let you read it if you will tell me first if that is your signature, sir.

A. As far as I recall it is my signature.

(Testimony of Milton G. Strain.)

Q. Do you recognize your signature, Mr. Strain?

A. I recognize this one better (indicating).

Q. Is this also your signature at the bottom of the first page? A. Yes, it could be.

Q. Is this your writing, the interlineation on the statement? A. I think it is.

Q. Go ahead and read it, sir.

(Counsel hands witness the statement.)

Q. (By Mr. Cummins): Does that refresh your memory as to how fast you were going just before the impact? A. That is right.

Q. How fast were you going? [173]

A. It says here two and a half miles an hour.

Q. All right, sir. Now, I wonder if you read it carefully enough—if you didn't, please feel free to take time to read it again, but doesn't your statement there mention two kick signs only and not three?

A. That is right, I didn't say we got three kick signs.

Q. Well, isn't this the way this thing happened? You got one kick signal and then a stop sign?

A. That is right.

Q. You don't know whether one car was released or more than one? A. That is right.

Q. As a matter of fact, you really don't know from your own knowledge if any were released. You just know that you got a kick signal and a stop signal; isn't that right?

A. That is right.

(Testimony of Milton G. Strain.)

Q. Then you got another kick signal and then a back-up sign. The back-up sign followed the kick sign, didn't it?

A. It followed the stop sign.

Q. Is that what your statement says?

A. Well, anybody would know that you have got to get a stop sign from a kick signal.

Q. Is this your statement, "We had just pulled a cut of I don't know how many cars we had from the rip track. The night was dark and foggy and I could not see too far. I got a kick [174] signal, made a kick move toward the west, then got a stop signal and brought the cut to a stop. I do not know how many cars were kicked, whether it was one or more than one. I was working on signals. After I got the stop signal and stood still a few signals I got another kick and then back-up signal and was moving toward the west at two and one-half miles an hour when the end of the cut I was handling struck a standing car or cut of cars, I do not know which." Is that your statement? A. Yes.

Q. In the face of that statement is it still your testimony that you got two kick signals and two stop signals and then another kick signal?

A. I only got two kick signals.

Mr. Cummins: Thank you.

Your Honor, I would like to introduce this statement in evidence.

The Court: It may be marked on behalf of the defendant.

The Clerk: Defendant's Exhibit B in evidence.

(Testimony of Milton G. Strain.)

(Thereupon the statement above referred to was received in evidence and marked Defendant's Exhibit B.)

Q. (By Mr. Cummins): How long have you been a fireman, sir?

A. Well, off and on ever since 1946.

Q. A period of five years?

A. Approximately five years. [175]

Q. During that time have you been a runner?

A. No.

Q. Well, have you run an engine?

A. A little bit.

Q. Have you been—have you ever been familiar with the operating rules of the Santa Fe Railroad? You had to study those rules?

A. Not too well.

Q. Well, you have to take some exams on them, haven't you?

A. No, not until you get your engineer's test.

Q. Did you ever take an engineer's test?

A. I started it.

Q. Well, it is not my purpose to ask you what your grades were in a thing of that sort. I am wondering if you are familiar with rule No. 813 of the Santa Fe rules. Would you gentlemen like to see Rule 813?

Mr. Papas: Yes, thank you.

Q. (By Mr. Cummins): I will not ask you what it reads like. I will show it to you. There are a lot of rules in that book.

(Testimony of Milton G. Strain.)

(Counsel hands book to witness.)

Q. (By Mr. Cummins): Now that rule, Mr. Strain, doesn't mean this in practice. That you, when you are operating an engine, must have a light of a switchman at all times in view? If the light goes out of your view you must stop?

A. Right. [176]

Q. Now, the light of a switchman didn't go out of your view in this instance, did it?

A. No, it didn't.

Q. You followed that rule, didn't you?

A. That is right.

Q. As a matter of fact, you had two lights within your view, didn't you? A. Yes.

Q. Now, Mr. Seamas didn't complain about his back to you the evening of the accident, did he?

A. No.

Q. Didn't mention his back to you, did he?

A. No.

Q. He showed you some scratches on his leg?

A. That is right.

Q. Describe it, will you please, to the best of your memory, if you can?

A. To tell you the truth, I don't know exactly how they were. I know his legs and shins were skinned up.

Q. Had skinned places on them? A. Yes.

Q. How about his hands?

A. I can't say now. It has been too long ago.

Q. Just one or two other things. Mr. Strain, the

(Testimony of Milton G. Strain.)

company requires—it is a positive requirement that you make an [177] accident report where there has been an accident, doesn't it? **A. Yes.**

Q. To make a 1428 report?

A. That is what I can't remember, whether I did or not.

Q. Well, I mean are you required to make a report? That is my question.

A. Well, you are—no, I mean yes, they will send you one out if the party who is hurt is putting in a claim.

Mr. Cummins: That is all, thank you.

Redirect Examination

By Mr. Papas:

Q. May I see that last exhibit in evidence? I don't think it was read, your Honor. Might we read it at this time so everyone will know what the contents are:

“Santa Fe Coast Line

“Statement relating to accident. To Joseph J. Seamas, a yard helper at Mormon, California, December 9, 1950; hour, 10:00 p.m.

“Instructions: Party making statement should read and sign same and his signature should be witnessed by party to whom statement was made.

“Statement of M. G. Strain made to J. R. Anderson at Richmond, California, on the 4th day of January, 1951.

“In the presence of My name is M. G. Strain, age years. I reside [178] at Richmond, California; telephone number is Bea-

(Testimony of Milton G. Strain.)

con 4451. I am a locomotive fireman by occupation, am married. I have been in the service of the Santa Fe about four years.

“On December 9, 1950, I was a fireman on yard engine No. 2351 and was operating engine at time of accident to Mr. Seamas, yard helper. Our engine was headed east and we were in backward motion toward the west. We had just pulled a cut of—I don’t know how many cars we had from the rip track. The night was dark and foggy and I could not see too far. I got a kick signal, made a kick move toward the west, then got a stop signal and brought the cut to a stop. I don’t know how many cars were kicked, whether it was one or more than one. I was working on signals.

“After I got the stop signal and sit still a few seconds I got another kick and then back-up signal and was moving toward the west at about two and a half miles an hour when the end of cut I was handling struck a standing car or cut of cars, I don’t know which. I had not received any easy signal before contacting this standing car or cars and therefore the impact was a little harder than usual. Right after this move we tied up. In the office after we tied up helper Seamas told me he had been on the brake platform of the car we struck in making our last move and the impact was so hard it knocked him off. As I understood he said he was on the brake platform to release the hand brake. He showed me some scratches and bruises on his leg, but I do not recall which leg it was. I

(Testimony of Milton G. Strain.)

have read the above two pages and as far as I can recall, this statement is true and correct.

“M. G. STRAIN.

“Witness:

“J. R. ANDERSON.”

Also the first page has the initials “JRA” and also the name “M. G. Strain.” That is the statement which you made to Mr. Anderson; is that correct, Mr. Strain? A. It must be.

Q. Now, Mr. Strain, I am just going to ask you one more question. What is the custom as to the movement of cars when one of the members of the crew is outside of the view of the engineer?

A. Well, it is up to the foreman to protect him.

Q. It is up to the foreman to protect him?

A. Yes.

Q. Now, to the best of your recollection you have stated that you saw this man at the bull switch move towards the shanty? A. Yes.

Q. You don't know whether he was backing up or going forward [180] towards the shanty, do you?

A. No, I don't.

Q. And you don't know who that person was?

A. No.

Mr. Papas: Very well, that is all. No further questions.

Recross-Examination

By Mr. Cummins:

Q. I wonder if we might clarify something here in which we have a conflict, Mr. Strain. In your

(Testimony of Milton G. Strain.)

direct testimony you told us that just before the impact you were operating on an easy signal?

A. Yes.

Q. In the statement you say that you had not received an easy signal. Give us your best memory.

A. Well, what you mean by easy signal—you have got two different distinctions between your back-up signals. You have got a big back-up signal that is a little faster than your easy signal. If you have got a long ways to go he will give you a big back-up signal that is not violent, but just kind of a hurry-up motion; but if you have got a short ways to go, say about three, four, maybe five car lengths, well, it will be slower and easier, and you will know that you are not going to go very far.

Q. Well, there isn't any conflict, then?

A. An easy signal is when you get within a car length, maybe car and a half or two, that he raises his lantern up [181] straight and eases you into the cut.

Q. Then you were operating on an easy signal, but you didn't get another easy signal?

A. That is right.

Mr. Cummins: OK; that is all.

Mr. Papas: Your Honor, it is so close to the four o'clock period. We anticipated a doctor to be here this afternoon. However, he couldn't get here.

The Court: Do you wish to recess?

Mr. Papas: Yes.

The Court: Ladies and gentlemen, at the request of counsel we will adjourn until tomorrow morning

at ten o'clock. The same admonition to you not to discuss the case under any conditions or to form an opinion until the matter is submitted to you.

(Thereupon an adjournment was taken until Wednesday, October 3, 1951, at 10:00 a.m.)

October 3, 1951—10:00 A.M.

The Clerk: Seamas vs. Atchison, Topeka & Santa Fe Railroad Company on trial.

Mr. Papas: May we proceed, your Honor.

The Court: Yes.

Mr. Papas: May we call Dr. McCloy?

DR. NEIL P. McCLOY

called as a witness on behalf of plaintiff, sworn:

The Clerk: Please state your name, your address, and your professional calling to the Court and to the Jury.

The Witness: My name is Neil P. McCloy, 1451 Masonic Avenue, San Francisco, and I am an orthopedic surgeon.

Direct Examination

By Mr. Papas:

Q. Dr. McCloy, would you be good enough, sir, to tell us where your offices are located?

A. 350 Post Street, San Francisco.

Q. Dr. McCloy, are you a duly licensed and practicing physician and surgeon in the State of California?

A. Yes, sir.

Q. Would you be good enough to tell us how

(Testimony of Dr. Neil P. McCloy.)

long you have been admitted to the practice of medicine in the State of California?

Mr. Cummins: Counsel, if you will excuse me I will stipulate to the Doctor's qualifications as an orthopedist.

Mr. Papas: Thank you, Mr. Cummins. I think the Jury would [183] like to hear what his qualifications are, your Honor.

The Court: All right.

Q. (By Mr. Papas): Thank you. Dr. McCloy, you have graduated, sir, from what medical school or schools?

A. University of Southern California.

Q. When did you graduate, sir? A. 1938.

Q. When did you interne?

A. 1937 to 1938.

Q. Did you do your interning at the University of Southern California?

A. No, sir, it was done here in San Francisco.

Q. What hospital was that done in, sir?

A. Mary's Help Hospital, San Francisco.

Q. You stated that you had a specialty in medicine of orthopedic surgery?

A. That is correct, sir.

Q. Would you be good enough to tell us what does this specialty in orthopedic surgery consist of, Doctor?

A. It has to deal with all the diseases, injuries, deformities of the motor-skeleton system. That includes all the limbs, the arms, and the legs, the spine and the neck.

(Testimony of Dr. Neil P. McCloy.)

Q. Does that include the bones in the joints?

A. Precisely.

Q. Does it include the ligaments, the muscles and the tendons [184] that are connected to the bones and the joints?

A. It has to do with all the parts of the skeleton, both the bones and the joints, ligaments, and all the soft tissues and muscles, tendons and nerves that go along with it.

Q. Doctor, are you associated with any other orthopedic surgeons? A. Yes, sir.

Q. Would you be good enough to tell us, sir, who they are?

A. I am associated with Dr. Ralph Soto-Hall and and Dr. K. O. Haldeman of San Francisco, both orthopedists.

Q. Doctor, I take it that you are associated with hospitals? A. Yes, sir.

Q. Would you be good enough to tell us what hospitals are you associated with?

A. With the St. Joseph's hospital and the San Francisco Hospital.

Q. Both of them are located in the City and County of San Francisco? A. Yes, sir.

Q. And Dr. McCloy, did you examine Mr. Seamas at my request and at Mr. Michael's request?

A. I did.

Q. Do you recall, sir, when you first examined Mr. Seamas? A. On January 2, 1951.

Q. When did you examine him after that date, sir, if you can remember? [185]

(Testimony of Dr. Neil P. McCloy.)

A. Again on the 13th of June ,the 27th of August and the 27th of September, 1951.

Q. In other words, you examined him as late as last Thursday? A. Yes, sir.

Q. When you first examined Mr. Seamas, Doctor McCloy, did you take from him a history of the injuries that he was suffering from?

A. Yes, sir.

Q. Would you be good enough to tell us before we get into what that history is, what is the purpose of taking a history?

A. We take a history in order to determine the mechanism and the extent of the injury involved. You have to know what happened to the man and how fast and how hard in order to get a good idea as to just how extensive the damage should be, and what type of injury would result from such a particular accident.

Q. And Dr. McCloy, I take it then that the taking of a history is a necessary part of your work in diagnosing a case? A. It is indispensable.

Q. Would you be good enough to tell us what history did Mr. Seamas give you of the injuries that he was complaining of?

A. He stated that in the course of his duties as switchman while working on top of a box car that he was knocked off and fell to the ground, landing on his feet, knees, and hands, thus suddenly doubling up, thus suddenly bending in the middle. He states that he had immediate pain in his mid low

(Testimony of Dr. Neil P. McCloy.)

back, [186] also some pain in the upper back and some weakness of the legs.

Q. And Doctor McCloy, I know that most of us are rather confused by some of the medical terms that you use in the human anatomy. Would you be good enough to tell us just what the vertebrae consists of in the human body?

A. If we can use the other side of the blackboard I could give a diagram.

Mr. Papas: Yes, thank you very much. May we, your Honor?

The Court: Yes.

The Witness: I will draw just a simple side view outline of one vertebrae. You will keep in mind, of course, that there are many of them and they are all stacked on top of each other like a stack of single blocks. (Witness draws diagram.)

This is just a simple side view of the vertebrae, very simple. This is the body of the vertebrae here (indicating). This is the part that comes out the back. It forms a joint with the other vertebrae, one above it, and one below it. There is another one right below, such as this (indicating). It is a very schematic—sketchy view of it in order to simplify it. Between the two vertebrae is a cushion right in here, soft cushion just like a shock absorber. It also acts as a hinge so that one vertebra can move a little bit against [187] the other. The rest of these processes that stick out of the vertebrae are all attachments for muscles that make the vertebrae move, also for ligaments that hold the vertebrae together.

(Testimony of Dr. Neil P. McCloy.)

Q. Dr. McCloy, I take it that we have some vertebrae in the neck area and in the upper back area and the lower part of the back, is that correct?

A. That is correct.

Q. What are the vertebrae in the upper portion of the body called?

A. The ones in the neck are called the cervical vertebrae which number seven. The ones through the center of the body and chest are the thoracic, roughly, twelve. The ones in the lower back are the lumbar vertebrae.

Q. Do we also have a portion of the human anatomy that is called the sacrum?

A. Yes, sir.

Q. What does that sacrum consist of?

A. The lower most portion of the spine excepting for the tail bone which is below that, but of little significance, and it consists of five or six vertebrae, but they are fused together. They do not have joints between them, and it forms the back of the pelvis, the back third of the pelvis.

Q. Dr. McCloy, you stated that you examined Mr. Seamas the first time on January 2, of [188] 1951?

A. Yes.

Q. And would you be good enough to tell us, sir, just what did your examination reveal at that time?

A. It revealed that he had painful limitation of motion of his back. He also had acute tenderness over the lower portion of the back where the greatest portion of the injury was received.

(Testimony of Dr. Neil P. McCloy.)

Q. Do you recall whether or not there was any tenderness over the dorsal area?

A. Yes, there was some tenderness over the upper dorsal vertebrae region of the third dorsal and some in the region of the eighth dorsal vertebrae.

Q. Would you kindly point approximately where that region is, doctor?

A. The third is right below the neck (indicating). The eighth is just below your shoulder blades at a level right even with the tips of the shoulder blades.

Q. You stated that he had some tenderness over the third lumbar. Where is that located, sir?

A. The third lumbar is almost in the middle of your lower back. The fourth is your waist line, the third is just an inch above the—an inch above it or less.

Q. And Doctor, was Mr. Seamas suffering from pain at that time?

A. Yes, sir. [189]

Q. Would you be good enough to tell us over what areas he was suffering this pain?

A. Mostly in the lower back at the junction of the lumbar spine and the sacrum. That is just below the belt line in the back.

Q. Did he complain of pain in the area of the legs?

A. No, sir.

Q. Doctor, would you be good enough to tell us, is pain an objective or a subjective symptom of an injury?

(Testimony of Dr. Neil P. McCloy.)

A. The statement of the back that a man has pain can be both. You can state that it is subjective. The ordinary evidences that one uses to observe a person to see, for instance—for example, if a man going about the normal course of his business, his duties, is observed to suddenly wince or jump from a sudden motion that is fairly good objective evidence, so it could be both.

Q. How do you determine then the pain which he has, doctor? Do you use pressure?

A. You use pressure to determine tenderness. Pain on pressure or on pushing with the fingers is known as tenderness. Pain from the other standpoint is easily observed if you take a man's wrist for instance, and bend his wrist and he jumps and screams it is pretty good evidence he does have a pain.

Q. Would you be kind enough to tell us, is limitation of motion [190] an objective or subjective symptom of an injury?

A. That is definitely objective.

Q. Sir, how do you determine whether or not a person who claims he has been injured, that he has limitation of motion?

A. One, by comparison. For instance, you ask a man to bend over forward as far as he can, or to bend backward as far as he can, and then you ask him to do it again and assist him. If he bends more with assistance it is presumed that he is voluntarily restricting his motions a little bit. There are other means of testing whether a person is voluntarily restricting their motions. For instance, a man's for-

(Testimony of Dr. Neil P. McCloy.)

ward bending of the back, stooping, can first be tested by having him stand up and bend over. You may then measure the distance between the floor and his fingers. He may then be, when off his guard later on, tested in a sitting position. You can have him sit down with both legs outstretched on the table in a sitting position, and have him reach for his toes, again measure it. A man may then lie on his back, raise his legs up in the air, and reach for his toes with his fingers and again measure it. If the measurements are all approximately the same, and if you are reasonably certain that the man is not aware of the fact that you are testing a specific motion by different means, then it is good objective evidence that the man is not voluntarily restricting his motion.

Q. Dr. McCloy, with these tests that you spoke of—were [191] these tests that you spoke of used by you on Mr. Seamas? A. Yes, sir.

Q. And did you at that time conclude that his complaints were substantiated by his injuries?

A. Yes, I believe it was.

Q. By that you mean that they were real?

A. They were real.

Q. You had no reason to believe that he was voluntarily feigning a malingering?

Mr. Cummins: Objection—

The Court: Overruled.

A. By all the tests that we have and have used in this instance I found no evidence of voluntarily

(Testimony of Dr. Neil P. McCloy.)

attempting to deceive the examiner, no evidence of malingering.

Q. Doctor, on that first examination were you able at that time to determine what, if any, permanent disability you had sustained?

A. No, sir.

Q. Did you at that time request the privilege or the opportunity of examining him at a later date?

A. I did, sir.

Q. Now, doctor, considering the type of injury that Mr. Seamas was complaining of, is traction a proper treatment for that type of injury?

A. Yes, sir, it is used very frequently. [192]

Q. What other means of treating that type of injury do you use, doctor?

A. Well, when first injured it is very acute and painful, they are treated by rest and by heat. This is gradually changed and the man is allowed more freedom and the rest in bed is replaced by the type of rest that you would get with a back support. For instance, adhesive tape, or a pelvic belt made of canvas, or if necessary even a brace made of metal. He is then taught to rehabilitate himself, and his back musculature by giving him special exercises to build up the muscles of his back and his trunk, abdomen, and then the support is gradually removed.

Q. Dr. McCloy, did you ask Mr. Seamas whether or not he was receiving this type of treatment?

A. Yes, sir.

Q. And what answer did he give you, sir?

(Testimony of Dr. Neil P. McCloy.)

Mr. Cummins: Objection. Hearsay and incompetent, if the Court please.

Mr. Papas: May I reframe the question, your Honor?

The Court: Yes.

Q. (By Mr. Papas): Do you know from your own knowledge what treatments he had received or was receiving, doctor? A. Yes.

Q. Would you tell us what those treatments were?

A. He received much the same thing that I just outlined in [193] answer to the previous question. In addition to that he also had massage and various types of heat therapy. He was given support with a canvas at first and then later was given a metal back brace to wear. He last received treatment in July, 1951.

Q. Did you at that time instruct him to continue these treatments?

A. There was no specific instruction given.

Q. You stated that he was using a back brace?

A. Yes, sir.

Q. Would you tell us what that back brace was, doctor?

A. It is a metal brace, something like a woman's corset. The garment gets a grip around the pelvis for a foundation, and it has two up-riggers in the back to which is attached a belt that goes around the abdomen and round the lower portion of the chest so that it is a corset actually that is anchored

(Testimony of Dr. Neil P. McCloy.)

to the pelvis by a rather firm belt. It prevents motion of the lower back.

Q. Doctor, when you first examined him was he using a cane? A. Yes, sir.

Q. And does a cane help steady a person's walking who has those types of injuries?

Mr. Cummins: Objection to that——

Mr. Papas: I will reframe the question, your Honor. I will comply with your request, Mr. [194] Cummins.

Q. (By Mr. Papas): What is the purpose of using a cane, doctor?

A. A cane ordinarily is used for an aid in walking. That is, either organic weakness or pain, or some difficulty with one's limbs.

Q. Do you recall, doctor, whether or not he was using crutches when you first saw Mr. Seamas?

A. I do not recall.

Q. I see. Now, you stated that you next saw him on June 13th of 1951? A. Yes, sir.

Q. And was the same or similar type of examination given to Mr. Seamas? A. Yes, sir.

Q. And did he have the restriction of motion of which you spoke at that time?

A. In June of 1951, the patient was objectively worse. He also had more complaints than he did on the first examination, and in general I felt that he was definitely worse at that time. On the first examination in January of 1951, he had no muscle spasm in his back that I could find and was defi-

(Testimony of Dr. Neil P. McCloy.)

nately present in June. His restriction was slightly increased at that time.

Q. Excuse me, sir.

A. He appeared to be having more pain than he had previously.

Q. Were the same tests used to determine whether or not the [195] restriction of motion and the pain that he was suffering from were real?

A. Yes, the same type of tests were used.

Q. Doctor, may I ask on the first examination of Mr. Seamas by you, did you or anyone under your supervision take any X-rays of Mr. Seamas?

A. Yes, sir, I did.

Q. And did you take any X-rays on the second examination? A. Yes, sir.

Q. Now doctor, you stated that you then saw Mr. Seamas at some time in August, wasn't it?

A. August 27, 1951.

Q. And was the same type of examination given to Mr. Seamas? A. Yes, sir.

Q. And what were your findings on that examination?

A. I felt that he was definitely improved in August.

Q. He had improved? A. Yes.

Q. Was he still wearing the back brace?

A. Yes.

Q. Did you at that time take X-rays of his back area? A. Yes.

Q. And during this third examination, doctor, did you test his lifting power?

(Testimony of Dr. Neil P. McCloy.)

A. No, I did not test it. I questioned the man about his lifting [196] power and he felt he could lift about 25 to 30 pounds, maximum.

Q. Dr. McCloy, did you take X-rays on the third examination?

A. There were three sets of X-rays taken.

Q. Three sets of X-rays?

A. The last ones, I believe, August 27, 1951.

Q. I have these X-rays, doctor. Would you be good enough to check them over to see if these are the X-rays which you took of Mr. Seamas?

A. Yes, sir. Do you wish me to demonstrate these X-rays?

Mr. Cummins: Your Honor, I don't wish to make any objection to the X-rays. I am satisfied if the doctor says they are the X-rays of Mr. Seamas, that they are; but I would like to know if the doctor has any notes of the X-ray technician, unless he took the X-rays himself, and if I might see those and the doctor's notes, if he is testifying from notes or from memory.

A. I have not attempted to testify from notes.

Mr. Cummins: Have you refreshed your memory from notes, doctor?

A. Yes, I have.

Mr. Cummins: Do you have those notes with you?

A. I have.

Mr. Cummins: May I see them?

A. You are welcome to them.

Mr. Cummins: Do you have any X-ray reports?

(Testimony of Dr. Neil P. McCloy.)

A. We have no X-ray reports available.

Mr. Cummins: Did you receive X-ray [197] reports?

A. Yes.

Mr. Cummins: But you didn't bring them to court, doctor?

A. No, but they are available if you are interested in them.

Q. (By Mr. Papas): Are you able to identify those X-rays, doctor?

Q. Are all of those X-rays X-rays of Mr. Seamas' back? A. Yes, sir.

Q. Were they taken under your supervision and at your request?

A. They were taken at my request.

Mr. Papas: May I have those marked, your Honor?

The Court: Yes.

Mr. Papas: Have them marked for identification, your Honor.

(X-ray films were marked Plaintiff's Exhibit 4 for identification.)

Q. (By Mr. Papas): Doctor, just pick out the X-rays which you feel best show the injury which Mr. Seamas complains of, if you will.

A. I think it is best to show the originals and the last ones.

Q. Well, would you be good enough to pick out the X-rays which you feel best bring out the injuries which Mr. Seamas complained of? [198]

(Testimony of Neil P. McCloy.)

A. The injury which Mr. Seamas complained of is an injury to the soft tissues, and the tissues have no calcium in them and they therefore do not show or throw a shadow on the X-ray. I will show you a picture of the area where his major complaints are, and also an area where some of his minor complaints were.

This is just a side view of the spine. This is taken in January. This accident was in December of 1950. This is approximately a little less than a month later. The only thing of real interest in these films—in this film, is what appears to be a very minor, small compression fracture of the front of the third lumbar vertebral body. This I know you can't see from where you are. It is a very small thing. It looks like some slight bending over of the front lip of the vertebrae there.

That is only important from the standpoint of determining the mechanism and the force that caused the injury. It has not proved to be important in itself. The patient was tender over this area until August of 1951, at which time his tenderness diminished markedly. His main injuries to his back are soft tissue injuries and injuries of the joints of the lower back.

Q. Those are not visible by X-ray, are they?

A. The actual injury itself is not visible in the X-ray.

Q. When was that film taken, sir?

A. January 2nd. No, I am sorry, this is June—

(Testimony of Neil P. McCloy.)

June 13, 1951. [199] It may be a little more clear in the original films.

This is one of the original films. I think now you can see it. It is a little more clear. You can see this slight line that runs through there and a slight compression of the front of the vertebrae as compared to the rest of them. This is smooth here (indicating on X-ray.) This is smooth here. Smooth here. Right here there is a slight mushrooming of the upper lip of the vertebrae.

Q. Thank you. Are you through with that X-ray, doctor? A. Yes.

Mr. Papas: May I have that marked in evidence, your Honor?

The Court: So ordered.

(The X-ray referred to was received in evidence and marked Plaintiff's Exhibit No. 5.)

A. Later X-rays were taken to determine whether or not this was truly a fracture. Whether it had been a fracture or not could ordinarily have been determined by two things: Either new bone formation would be present to show that there was a fracture originally or the actual line of compression would have changed in density. It might have either dissappeared or partially disappeared.

In this film of August 27, 1951, there had been a slight change, and it has become more smooth and the line of density—the line of fracture, which we originally felt was fracture, [200] has changed in density. This is not, as you would say in the vernacu-

(Testimony of Neil P. McCloy.)

lar, flat-footed evidence of healing, but it is good evidence.

Q. Are you through with that, Doctor?

A. Yes.

Mr. Papas: May we admit this in evidence, your Honor, as Plaintiff's Exhibit next in order.

The Court: So ordered.

(The X-ray of August 27, 1951, was admitted into evidence and marked Plaintiff's Exhibit No. 6.)

Q. (By Mr. Papas): Do you have any other X-rays, doctor, that would show any changes that have taken place since the date of the injury in that lumbar area?

A. No, there have been no other changes except those that I have spoken of.

Q. Would you be seated, please.

(Witness resumes witness stand.)

Q. Dr. McCloy, can you tell us whether or not there was any derangement of the intervertebral disc between the lumbar region and the sacrum?

A. In speaking of his injuries being mostly soft tissue injuries, I included in that the joints of the spine, the ligaments around the joints, and the rest of the soft tissue structure such as the intervertebral disc or cushion which I pointed out exists between two vertebrae. [201]

This structure is particularly vulnerable to falls where a person lands on their feet or knees and

(Testimony of Neil P. McCloy.)

gives the spine an upward thrust; or when the back is bent too far forward or too far backward. And I feel that, with the amount of tenderness and restriction of motion, especially since the restriction of motion is one-sided so far as lateral bending of the back is concerned, that is, bending from right to left, that this structure is one of the soft tissue structures about the lower back that has been damaged by his accident.

Q. Doctor, this is what you term an intervertebral disc? (Indicating on diagram on blackboard.)

A. Yes, that is the disc or cushion that exists between two vertebrae. This actually is a soft cushion.

Q. And the purpose of that, doctor, is what?

A. To act as a shock absorber. For instance, if you were to walk down a hard sidewalk without a shock absorber between the vertebrae the actual shock of your foot hitting a hard object would be immediately transmitted by bone to your head and the vibration would be excessive. Not only that, but it also acts as something of a hinge to assist in motion between the vertebrae.

Q. Doctor, did you feel that he has a protrusion or herniation of that intervertebral disc of which you speak?

Mr. Cummins: I object to the form of the question, your Honor. [202]

Mr. Papas: I will reframe it, your Honor.

Q. Dr. McCloy, did you come to any opinion or

(Testimony of Neil P. McCloy.)

conclusion as to whether or not there was any herniation or protrusion of that intervertebral disc?

A. No, sir.

Q. Did you come to any opinion and conclusion as to whether or not there was any derangement?

A. Yes, sir.

Q. Of the intervertebral disc? A. Yes, sir.

Q. Doctor, is it probable that at a later date, after this derangement had taken place, that the intervertebral disc may herniate or protrude?

Mr. Cummins: I object to the form of the question.

The Court: Sustained.

Q. (By Mr. Papas): Dr. McCloy, would you be good enough to tell us what the significance is of these changes that have taken place as you showed us in the X-ray films of the third lumbar vertebrae?

A. The significance of that is not that the fracture itself is important, because the man apparently is recovering from any injury to the area without any difficulty. It is merely an index to allow you to know how much force was used in the production of the injury.

If I might give an example, for instance, if one were to [203] violently twist an ankle two things have to happen: Either you have to tear the ligaments, or the bone has to break. It is very rare that they both happen at the same time. In a young person who has strong bones the bones don't break; the ligaments tear and you get a sprained ankle. If you are an older person and have relative weaker

(Testimony of Neil P. McCloy.)

bones the ligaments hold and you break your ankle.

Also herein, thinking of this problem, this man apparently had an injury sufficient to produce a small fracture. The bone did not give very much, and we then argue from that that his soft tissues did give a great deal. And that is apparently borne out by the man's examination and his subsequent progress.

Q. Dr. McCloy, after having examined him on four occasions, have you reached an opinion or conclusion as to what the diagnosis of his injuries are?

A. The actual diagnosis is, No. 1, an acute bending sprain of the lower back about the lumbar-sacral joint, the junction of the lumbar spine and the sacrum. This includes tearing of the ligaments about this joint and damage to his intervertebral disc; No. 2, a slight compression fracture of the third lumbar vertebrae.

Q. Doctor, a person suffering from this type of injury, do they get any relief by sleeping on a hard surface such as a floor or a hard bed? [204]

A. Yes, sir, they often do.

Q. Dr. McCloy, have you reached an opinion as to whether or not the injuries which Mr. Seamas has suffered are permanent?

A. Mr. Seamas has sustained some permanent injuries, which will consist of pain in his lower back on extremes of motion, and approximately 20 to 25 degrees restriction of the motions of forward and backward bending, and bending to the right,

(Testimony of Neil P. McCloy.)

together with some weakness of the back, and pain in the back on hard use.

Q. And, Doctor McCloy, you knew of course that he was a switchman for the Santa Fe Railroad Company?

A. Yes, sir.

Q. And do you feel that he will be able to carry on his duties as a switchman in the future?

A. I think it may be possible in a year or two, but I rather feel it would be improbable because——

Q. Do you feel——

A. Pardon me. ——because of the nature of the work, which requires a great deal of climbing and agility.

Q. Do you feel he would be better off by doing lighter work?

A. Yes, I do.

Q. Doctor, I take it that the medical profession more or less stereotypes the injuries which a person has as slight, moderate or severe?

A. Yes. [205]

Q. Will you be good enough, if you can, sir, to classify the injuries which he has sustained?

A. I think any injury which produces permanent changes and permanent disability can readily be classified as severe.

Q. Now, Doctor, earlier you stated that there is a probability that the intervertebral disc in the lumbar-sacral area may in the future protrude or herniate. Would any surgery afford him relief?

Mr. Cummins: Objected to. There is no such evidence in this case at all. The question is leading

(Testimony of Neil P. McCloy.)

and suggestive, and it cites what purport to be facts that are not in this record.

The Court: Could the Doctor in his own words tell us about the disc derangement?

A. Yes, sir.

The Court: You characterized it as derangement?

A. Yes.

The Court: First, will you define "derangement," then, if it be a fact that there is a prospect, reasonable in nature, of a herniated disc, will you indicate in line of time element when that might occur, if it does occur?

A. All right. The derangement—the definition of "derangement," used in this particular sense or this particular area, is any disturbance of the function of the disc, such as tearing of the ligaments that hold the disc in place; over [206] stretching of the ligaments that hold the disc in place; sudden violent compression of the disc that may crack the cartilage plates, which are flat, smooth, shiny faces of the vertebrae, thus allowing the central disc material of the vertebrae—

Mr. Cummins: Excuse me, Doctor. I object to this unless it is confined to this patient, reasonable medical certainty with respect to this patient, the Doctor's conclusion with respect to reasonable certainty and not an exposition of what a disc may be.

The Court: We have to understand what a disc is, and the jurors do, and I will overrule the objection.

(Testimony of Neil P. McCloy.)

A. If I may demonstrate, to simplify this.

(Witness leaves witness stand and goes to blackboard.)

A. (Continued): The actual center of a disc is almost liquid. It is a semi-solid, comes out as liquid, a fairly thick liquid. When you bend your vertebrae this way, bringing the two faces together like that in front, that semi-solid or liquid center moves to the back just like a bubble in a level.

When this disc is damaged by sudden pressure, these two blocks of the vertebrae—say the one on your right is the normal disc, this disc material in here, which is semi-solid liquid or liquid center, these lines on the outside of the disc being the ligaments that hold the disc to the [207] vertebrae. If they are suddenly jammed together as from a fall and the two vertebrae approach each other like this, the ligaments shorten. The liquid is in the center like that. Liquid is not compressible like air, so that it will force these ligaments out like that, making a bulge, may cause them to tear.

An actual compression or injury might drive this liquid out through the various portions of the disc, disrupt the architecture of the disc, and on rare occasions it may be so violent as to drive them right up into the bone of the vertebrae. That is what is known, as simply as I can explain it, as derangement of the disc, without actually breaking the disc right through the ligament, which is known as a herniation or rupture of the disc.

(Testimony of Neil P. McCloy.)

If the compression force is so violent as to drive the liquid content or disc out to the ligaments into the posterior portion, back portion of the neuro canal, which runs through here, that is known as a herniated disc. I am not speaking about a herniated disc, but merely of damage to the intact disc that has not herniated.

(Witness resumes witness stand.)

A. (Continuing): I feel this, that this man had sufficient injury in the first place to have a derangement to the disc by the nature of his fall from a height on to his feet, followed by violent pain in his lower back, together with the [208] fact that he has had continuing tenderness and restriction of motion ever since that time. He also has had concomitant injury to the ligaments about this particular joint.

As to whether or not this disc may herniate in the future, I cannot prophesy whether or not it will herniate, and I am not certain whether the possibility of it occurring in him would be any greater than in any other person of the same type of build.

Q. (By Mr. Papas): Dr. McCloy, just one more question: Assuming that a person of Mr. Seamas' physical makeup and his age was standing at or near a brake platform of a railroad boxcar, approximately ten or twelve feet above the level of the ground; that he was by some violent jar knocked to the ground and, on falling, he fell in

(Testimony of Neil P. McCloy.)

a jackknife position on his knees and on the palms of his hands. Would that type of fall cause the injury of which Mr. Seamas complains?

A. Yes.

Mr. Papas: You may cross-examine.

The Court: We might take the morning recess, if convenient.

The same admonition to you, ladies and gentlemen of the jury, not to discuss this case under any conditions or circumstances and not to form or express an opinion until the case is submitted to you.

(Thereupon a short recess was taken.) [209]

Cross-Examination

By Mr. Cummins:

Q. Doctor McCloy, did you give Mr. Seamas any treatment yourself?

A. No specific treatment other than some advice such as in one instance to discard his cane, and on another some special exercises to begin.

Q. It was your thought that he shouldn't use the cane? A. That is correct, yes, sir.

Q. You told us that using a cane was a good thing for people in some circumstances, but in this particular instance it wouldn't be your medical opinion that this man should use a cane or should have used a cane; is that it?

A. That is correct.

Q. Now, at whose instance, or how did you happen to see Mr. Seamas first on January 2, 1951?

(Testimony of Neil P. McCloy.)

A. I was requested by his attorney, Mr. Michael, to examine the patient.

Q. That was approximately three weeks after this accident took place that you first saw him?

A. Yes, sir.

Q. And you didn't see him again until June?

A. That is correct.

Q. You mentioned during the direct examination that the history the patient gives you is indispensable to you in arriving at a diagnosis, and you told us something as to [210] why it is indispensable. May I ask this, Doctor, that if the history that the patient gives you is not accurate does that have any bearing or effect on your ability to correctly diagnose the case?

A. Yes, it could have, certainly.

Q. I am wondering if Mr. Seamas told you whether or not he worked after he fell?

A. I do not recall that, sir.

Q. Would it be important to you to know whether or not he worked after he fell?

A. Not necessarily.

Q. If he climbed on a boxcar and set a hand brake would that have any bearing upon the degree of injury? Would it be one fact of the facts that would be of value to you in determining the degree of injury?

A. That question cannot be answered yes or no, but I may attempt to answer it by explanation.

Q. Please do, sir.

A. People may have very severe injuries and in

(Testimony of Neil P. McCloy.)

the course of duty or because of necessity can readily perform certain almost unbelievable actions immediately after the injury because there is a type of anesthesia that occurs after serious injury. By way of example, the patient may walk down the street, step off a curb and sprain their ankle very severely. They may even dislocate their ankle. In attempting to [211] cross the street they may be in jeopardy of their life. I can assure you that the patient can usually run out of the way of the automobile or the street car with apparent ease and not in pain. Pain appears somewhat later after injury. Sometimes it may appear immediately, but if the nerves are damaged then pain does not always appear right away.

Q. Didn't Mr. Seamas tell you he was in pain right away? A. Yes, he did.

Q. Of course, under the battlefield conditions a person may have a wound and because of the emergency nature of the circumstances he may not become conscious of pain. That is the sort of thing you have told us about, isn't it?

A. No, sir, it is a physical thing. It is not entirely mental.

Q. But in a yard, a railroad yard where there is no evidence thus far of anybody being in any rush or hurry, that pain would become conscious a little quicker generally, wouldn't it?

A. I am not acquainted with the urgency of the situation at the time.

Q. Well, I want you to assume, in view of the

(Testimony of Neil P. McCloy.)

record in this case, that there isn't any evidence of any urgency; what would be the answer under those circumstances?

A. The man could very easily have immediate pain; very easily. That is the more usual thing. Extensive anesthesia is far [212] less usual.

Q. Now, doctor, you have told us that pain is a subjective symptom. You have to depend as a doctor, to some extent at least, upon the patient's accuracy in telling you how he feels when you press on a given spot. He says that hurts, don't you?

A. To a certain extent only.

Q. Then, as far as limitation of motion is concerned, if you tell me to bend forward as far as I can bend, I may bend this far (indicating), or if you are not looking I might even get over and tie my shoe, but isn't this true, Doctor, that the interpretative process, you as a physician are on some test and your accuracy is a very important feature in interpreting just how much of that patient's loss of motion is real and how much is not real, isn't that correct?

A. That is correct. That is why we use far more than one test. In order to cross-check ourselves to make sure that we are not being deluded.

Q. Even after cross-checking you sometimes make an error, don't you?

A. Being human, always.

Q. Would you say that Mr. Seamas is in any degree suggestible?

(Testimony of Neil P. McCloy.)

Mr. Papas: Excuse me, your Honor. That is a very vague term to use. I——

The Court: Overruled. [213]

A. Do you wish me to answer, sir?

Q. (By Mr. Cummins): Please, sir.

A. I would also like to answer that question, "Yes," with explanation. Mr. Seamas has a definite type of personality, just like everyone else does. I have not found him to be suggestible and have not voluntarily or willingly tried to suggest anything to him in order that I may act as a——

Q. Please, Doctor, I didn't mean that you would have suggested anything. I am not throwing any aspersions at you.

A. No, I know. I understand that. I do not wish to give that impression either. I try to remain as an independent and very impartial examiner throughout and to examine him on more than one occasion so that I may acquire an estimate of his whole personality. After all, it is not the back that is injured, it is the man that is injured.

Q. Doctor, I notice in your note here—you don't write any better than we lawyers—I am going to ask you to read it.

"Apprehension"—I can make that word out. Would you read the rest of the sentence?

A. All right, it says, "Apprehension—Further exam apparently normal for this patient." In other words, on further examination it appears to be normal for him.

"Must consider the patient and not the back."

(Testimony of Neil P. McCloy.)

Q. What did you mean by that?

A. In—may I ask you to be more specific in your question, [214] please?

Q. What did you mean by your note, “You must consider the patient, not the back.”?

A. Whenever you treat a patient for a disease or an injury or a deformity you have to treat the patient, not their deformity. You have to consider the patient as a whole. I can give you a little example, if you wish. For instance, the correction of deformity during the growth period. In making any change in the dynamics of a child’s—a growing child’s limbs, you have to take growth into consideration, and you have to visualize the patient twenty years hence and not just for the next few months.

Q. All right, doctor. When you showed us the X-rays that you showed us you told us there was a compression fracture of the third lumbar vertebra, is that correct?

A. Yes, sir.

Q. That is your opinion, that there was a compression fracture?

A. That is my opinion.

Q. How old was that fracture, doctor?

A. We have no objective evidence of its age prior to the X-rays taken in January of 1951, other than that it appeared to have all the findings of a recent fracture. There was no evidence of healing. There were no defects in the adjacent vertebrae of the same type and it looks like it may have been a [215] slight wedging of the vertebrae.

Q. It is of considerable importance to you, doc-

(Testimony of Dr. Neil P. McCloy.)

tor, in determining the nature and the amount of force sustained by Mr. Seamas, that fracture, isn't it?

A. No, it is only part of the knowledge that is required to come to that conclusion.

Q. It is one of the facets?

A. Just one of the things. We certainly will not go on just one finding alone.

Q. It is important to determine the mechanism and the causes of the injury?

A. It is a factor.

Q. And the degree of injury?

A. That is correct.

Mr. Cummins: Would you step down to the box, please, Doctor? May we have the light?

(Witness complies.)

Q. (By Mr. Cummins): Do you see that compression fracture in this X-ray, doctor—without looking at the date, please, doctor?

A. I won't look at the date. I wish to determine if it was supposed to be a picture of Mr. Seamas?

Q. It is Mr. Seamas' back, I assure you. Just look at the X-ray and tell me if you see the compression fracture?

A. Yes, I see the same thing to a certain extent right here (indicating). [216]

Q. Now look at the date, doctor.

A. The date on the film is marked September 5, 1939.

Q. Yes.

(Testimony of Dr. Neil P. McCloy.)

A. We, of course, have had no access to the films of this age.

Q. May I apologize to you now for bringing it up in this way, but as it is a duty to my client, and I feel that it is necessary to point out dramatically to this jury that this picture shows the same thing as in the later X-rays. I am sorry that I did that to you.

A. I have no other interest in the film other than I am very happy to see it because in the interests of honesty, to say nothing of my own curiosity, I am much relieved to have the mystery opened up.

The Court: Doctor, may I ask you to point out that fracture? I was seated on the bench at the time.

The Witness: There is a slight mushrooming of the forward lip of that vertebrae right there (indicating), as compared to some of the others. It may or may not have been due to injury.

The Court: That is the same fracture which apparently is projected in the later X-rays?

A. That is very similar to what is found in later films.

The Court: Is it the same, doctor, would you say?

A. I would say it is probably the same. 4/5/43. It is most likely the same, although I can't count the vertebrae accurately. [217]

Mr. Cummins: Would you like to compare them, doctor? I will give you the other X-ray.

The Court: Pardon me, doctor. Merely for the edification of the jurors and the Court, who are not skilled in matters of medical science, wouldn't a

(Testimony of Dr. Neil P. McCloy.)

fracture reflected as of 1939, that is, as to date, show a healing process as of the present date and not be reflected in the X-ray at all?

A. Depending on how much deformity had occurred in the original injury.

The Court: I see.

A. If there was considerable squashing of the vertebrae, it would be there permanently; would be very little change over a period of years and might become worse.

The Court: But the fracture line would reflect itself by recent pictures?

A. From a squashed injury actually?

The Court: Yes.

A. Ordinarily, no. There would be other changes that would be more significant than an actual line. These films of October 3, 1951, show the same thing to a slightly greater degree. It may, however only be due to the magnification in the actual X-ray set-up that took the films. The magnification depends on the distance of the tube to the person. It may have been closer here than it was here, and everything looks bigger in this picture than in this picture. They look very similar. [218] If I might add, this originally was questioned by the specialist in radiology as either a possible spur or a fracture. At a later date we felt there was a possibility of a fracture. However, this has been thrown out in the case of the older film which shows a very similar defect.

(Testimony of Dr. Neil P. McCloy.)

Mr. Cummins: Thank you, doctor.

A. I don't believe it detracts—

Mr. Cummins: May I have this marked in evidence as next in order?

The Court: So ordered.

(An X-ray was received in evidence and marked Defendant's Exhibit C.)

The Court: You were about to finish an answer, doctor, when you were interrupted. You said you did not believe that it detracts. Will you complete that answer?

A. I did not believe that detracts from the objective and subjective evidence of the kind of injury at the present time.

Mr. Cummins: Your Honor, I am going to ask that that remark be stricken out, because that is what this jury is to determine, and it therefore is incompetent.

The Court: Well, I think it would be a subject matter of expert testimony. I will disallow the motion.

Q. (By Mr. Cummins): Doctor, do I understand you to state, then, that it is of no importance now whether or not there was a compression fracture of sufficient force and direction of [219] blow to constitute a compression fracture?

A. As I answered a previous question, that was only one part of the examination and only one facet of the necessary factors that one has to get together to make a conclusion.

(Testimony of Neil P. McCloy.)

Q. Very well, doctor.

A. There are others.

Q. Have you ever been informed that Mr. Seamas suffered a nervous breakdown in 1947?

A. That is correct.

Q. Don't you think that at least part of this so-called disability is due to his mental attitude toward his condition and not to anything that objectively happened to his back?

A. The answer to that, sir, is that his mental attitude toward his condition only appeared after his injury. He did not have the mental attitude toward his condition before the injury, and I do therefore feel that his mental attitude and his apprehension and anxiety is the result of his injury.

Q. Do you think that after this case is over his mental attitude might get somewhat better and his condition might improve? A. I doubt it.

Q. Have you seen cases where after the case was settled, or the case was over, that the patient with a mental attitude about his condition would improve?

A. To my own personal experience, I have seen very, very few as [220] you describe.

Q. You do——

A. (Interposing): It does happen.

Q. You do say that you see in this patient evidence of apprehension? A. That is correct.

Q. And an ironic element of the thinking of the patient about his own condition which contributes to his current disability, isn't that correct?

(Testimony of Neil P. McCloy.)

A. I see in this patient apprehension, which is anxiety or fear for the future, or fear of being hurt, either on movement or on examination, which is a normal reaction to this particular man. It happens for this particular man that is the normal reaction. After all, this man was hired this way. The man was given a job for himself as he is, and as he was.

Q. Didn't it give you a little difficulty, as far as a doctor, to determine how much of his inability to move backward or forward or to one side or the other was voluntary and how much of that is involuntary?

A. It is difficult, but then there are means of determining that within reason.

Q. When you have a patient whose thinking about himself contributes to his disability, it becomes even more difficult to determine with any accuracy what his real disability is, doesn't it? [221]

A. Depends on the actual severity of that apprehension, which in this case I would consider to be moderate and not extreme or severe.

Q. Moderate instead of severe now, is that right?

A. His apprehension, not his injury.

Q. Let me ask you about these X-rays that you have taken—these drawings that you have taken. Do you see any objective signs of any injury in X-rays now?

A. As I answered a previous question to that this morning, sir, there is no evidence—there is no objective evidence of injury in the X-ray itself, which is only a shadow picture, after all.

(Testimony of Dr. Neil P. McCloy.)

Q. You told us this, that you have in your opinion a soft tissue injury, an injury that possibly compressed and deranged a disc and tore the tendons?

A. No, sir. The ligaments.

Q. The ligaments. That is your opinion, is that correct?

A. Yes, sir.

Q. That is based upon all the things you told us about, including some evidence as to what you thought of as a compression fracture?

A. That is true, sir.

Q. Doctor, soft tissue, to use the medical terminology, is fascia ligamentus, skin, veins, nerves, everything but bones, isn't it? [222]

A. That is correct.

Q. Wouldn't you normally expect a much quicker healing of this man for his mental attitude?

A. I would like to answer that by way of explanation. I believe that his personality will prolong his disability to a certain extent. Not to a major extent, but just—well, to make it more clear, let's say approximately it might make his disability 20 to 25 per cent longer. But then this apprehension and the necessity for prolonged disability didn't exist before accident. It only occurred after accident and is directly or indirectly the result of the accident.

Q. Let's come back to the suggestibility, doctor. If a person is examined by many doctors and contacted, talked to by many lawyers, there is at least a possibility he can begin to feel sorry for himself, isn't there?

A. That is a possibility.

(Testimony of Dr. Neil P. McCloy.)

Q. And if there is some chance of a reward, that may enter the picture?

A. That is a possibility.

Q. And it may enter it on an involuntary basis or a voluntary basis?

A. That is true.

Q. In other words—I live in a glass house; I don't throw stones at anybody—it is entirely possible for Mr. Seamas to honestly have a feeling that he is injured because of [223] suggestibility, because of these numerous medical examinations and because of the lawsuit pending, isn't that true?

A. Not in his case as I examined him before he was seen by many doctors and many lawyers.

Q. When you first saw him he had no muscle spasm in his back?

A. That is correct.

Q. The muscles were not tense around his spine?

A. He had no muscle spasm.

Q. And he had no splinting in the back by stiff muscles when you first saw him in January, 1950, isn't that true?

A. That is not a frequent finding in the presence of injury. It does occur, but it isn't always present.

Q. It wasn't present in this case?

A. I was not present in this case.

Q. But it was six months later?

A. That is true.

Q. When a man—let's say myself. I am convinced I have an injury to my back, and I hold it as stiff as a poker for six months, I will have muscle spasm, won't I?

A. You will have voluntary contracture of

(Testimony of Dr. Neil P. McCloy.)

muscles. You probably will not have what is known as true involuntary muscle splinting.

Q. That is absolutely true. Won't have an involuntary muscle splinting thereby, but brought on by my own involuntary action [224] by holding my spine stiff? A. That is correct.

Q. But it will be difficult for you as a doctor to tell whether it is voluntary or involuntary?

A. So that you have to depend on other findings.

Q. Yes. You found him improved in August?

A. Yes.

Q. And in September? A. Yes.

Q. Do you think there is a herniated disc in this case? A. No, sir.

Q. Would you operate on him? A. No, sir.

Q. Feeling there is a 25 per cent disability in this case, why wouldn't you operate and fuse his spine so that there won't be any disability?

A. I don't think it is indicated.

The Court: What was that last question, Mr. Cummins?

Mr. Cummins: Will you read the question, Mr. Reporter?

(Question read by Reporter.)

The Court: Doctor, what was your answer?

A. I do not think an operation is indicated at this time, or at any time, from my opinion at this moment.

Q. (By Mr. Cummins): Could you remove disability by an operation in this case? [225]

(Testimony of Dr. Neil P. McCloy.)

A. No, sir, I do not believe so.

Q. Is it possible in some cases where you have that back injury to relieve disability by a fusion operation?

A. Yes, sir.

The Court: What is a fusion operation, for the jury? I happen to know, doctor, but the jurors possibly do not.

A. A fusion operation is where you actually grow two vertebrae together by means of a bone graft in order to stop motion of that particular joint.

Q. (By Mr. Cummins): Doctor, do you feel that Mr. Seamas could do passenger work, like a brakeman? He has worked as a brakeman. He has done some work as a brakeman. Do you think he could ride the passenger trains?

A. Not at the present time.

Q. Do you think he will ever be able to?

A. I think it is possible, but improbable.

Q. Now, I want to ask you about a disc and the prognosis as to possibility of a disc.

A. Pardon me? Possibility of what?

Q. Your prognosis as to possibility of a disc.

A. Oh.

Q. I believe you told us you didn't feel Mr. Seamas was any more likely to have a herniated disc than anybody else of his shape and build, is that correct?

A. That is correct. [226]

Q. You don't feel any operation for a disc is going to be necessary?

A. I do not think so.

Q. That means, then, that there is no narrowing of the space between the vertebrae?

(Testimony of Dr. Neil P. McCloy.)

A. Yes, he does have.

Q. But you still feel it does not indicate a herniated disc? A. No, sir.

Q. He has a congenital defect between the first sacral and the fifth lumbar? A. Yes.

Q. And a congenital defect, for the benefit of the jury, means he has had it all his life, and he was born with it. A. Correct.

Q. There has been no change in reflexes indicating any impairment to any of the nerves emanating from this man's back? A. No, sir.

Q. No sensory changes indicating any such impairment? A. No, sir.

Q. You have taken no pantopaque tests?

A. No, I didn't feel it would be indicated in the absence of reflex changes.

The Court: Pardon this interruption, Mr. Cummins, but [227] that is another technical term that might be explained to the jury.

A. A pantopaque test consists of determination by a radio opaque dye, a dye that will cast a shadow. It is a liquid dye that will cast a shadow on an X-ray plate when you ray it with X-ray, so that it can be put into a cavity inside of soft tissue, and when you take an X-ray it will show up the dye in the cavity. Pantopaque tests, determining types and kinds of injuries and diseases of the intervertebral discs, is put in the spinal canal around the nerve and it will cast a shadow of a bulging disc and show a difference in the shadow if the disc is bulging.

Q. (By Mr. Cummins): Thank you, doctor.

(Testimony of Dr. Neil P. McCloy.)

Now, so that we may be absolutely clear, is it correct to state—am I correct in saying that in so far as a ruptured disc that you have described here in the board, or a herniated disc, meaning the same thing, is concerned——

A. Yes.

Q. There is no evidence of that in this case?

A. There is no external evidence of it.

Q. What this case comes down to, then, in your opinion, is a soft tissue injury?

A. If you will accept my definition and include in that the intervertebral disc.

Q. Yes, I am accepting your definition. [228]

A. Yes, sir.

Q. Doctor, when you have a sprain of an akle, what is normal healing when you have a soft tissue injury, as a sprain of an ankle?

A. Your example will not cover the definition, because you have to include in it, if we may repeat ourselves, speaking of soft tissue injury of the lower back, I wish to include the ligaments and the muscles, the intervertebral discs, the joint surfaces, the cartilage on the joints, and the bone, and the lining of the joints. So that your example does not quite cover the ground.

In speaking of a sprained ankle, one seldom injures the lining of the joint. You merely force the joint open and tear the ligament that holds the joint together, and also the lining and covering of the joint, known as the joint capsule. If it is a mild sprain or only a few fibers or ligaments are torn,

(Testimony of Neil P. McCloy.)

which we will now define as the ordinary sprained ankle, the average healing time is approximately—well, let me define average healing time. The time that a person would actually go back to work and be free of pain—that would be approximately five weeks for that. A serious sprain of the ankle, that is a different problem.

Q. Doctor, does Mr. Seamas have muscle spasm in his back now? A. I don't know, sir.

Q. Did he have, on September 27th, when you last saw him? [229] A. No, sir.

Mr. Cummins: Thank you, doctor. That is all.

The Court: Counsel would like to ask you another question, doctor.

Mr. Papas: I just have one or two more questions, doctor.

Redirect Examination

By Mr. Papas:

Q. Doctor, I remember you stated that the small compression fracture which you mentioned to us on that X-ray machine was of minimal significance, is that correct? A. That is right. In itself.

Q. In itself. The main difficulty, as you explained it, is the intervertebral disc between the lumbar region and the sacrum, is that correct?

A. No, sir, all the soft tissues about the joint. By way of explanation, this joint is the one between the spine and the pelvis, between the lumbar spine

(Testimony of Neil P. McCloy.)

and the sacrum. The sacrum is the back of the pelvis. The nature of this injury is a tearing of all the soft tissues about that joint and probable injury to his intervertebral disc.

Q. Doctor, I know that all of us are interested in rehabilitation of a person that has been injured. What do you feel can be done to possibly rehabilitate this man, the physical and mental condition that he has?

Mr. Cummins: This is beyond the scope of direct examination and cross-examination, your Honor. [230]

The Court: Overruled, but I think the question should be phrased to the extent that the condition could be, maybe, associated directly with the physical infirmities. A. Yes.

The Court: Otherwise, of course, the mental condition would not have any particular relevancy, doctor.

A. His mental condition, is, of course, because of apprehension, anxiety over his future as to whether he will be able to return to a gainful occupation, preferably his own, and so forth. I believe that can be indirectly or directly associated with his injury, because it appeared after his injury and because of his injury.

Q. (By Mr. Papas): And what do you feel can be done to rehabilitate that condition?

A. Do you wish me to outline a treatment, more or less?

Q. I wish you would, sir.

(Testimony of Dr. Neil P. McCloy.)

A. I believe he would be benefitted by being sent to a rehabilitation center where he would be given exercise therapy to gradually build up his strength. Also occupational therapy. He is taught to very, very gradually use his back, and thereby gain confidence in himself, to say nothing of improving his back. This would have to be closely supervised and would probably go on for a period of possibly four, five, six months.

Mr. Papas: No further questions.

Mr. Cummins: I have nothing further. I would like to give [231] the doctor back his notes, though.

The Court: Doctor, just one question, please?

A. Yes, sir.

The Court: Is the plaintiff wearing a corset or brace at the present time? A. Yes, sir.

The Court: That is the corset or brace you described for the jurors and the court?

A. Yes, sir. He is wearing a metal type of brace as originally described. It does about the same thing as a corset. It limits motion in the lower back.

The Court: Is there any physical discomfort to the wearing of that brace or apparatus?

A. Not very much. He actually obtains some relief from the wearing of it, according to his statement.

The Court: How much longer do you anticipate he might, under the ordinary course of reasonable expectation, how long would he wear that support?

A. Depends on how he got along. If he were to

(Testimony of Dr. Neil P. McCloy.)

improve gradually he would probably like to remove it after a period of exercise therapy so that he could support himself, and it would be removed gradually over a period of three or four months.

The Court: Doctor, this question may have some psychiatric aspects, but do you believe that the present asserted apprehensions on the part of this man are related in any way [232] to the injury sustained, or have they some relationship to a prior condition which has been referred to in the evidence?

A. They have no relationship to a prior condition. This condition is a fear of pain and fear of being unable to go back to a gainful occupation.

The Court: I notice the posture of the plaintiff. He has a very peculiar posture. Have you noted that, doctor?

A. Yes, sir.

The Court: Do you think that is a feigned posture? Do you think that it is one that is brought on by some malingering, or is it something you can definitely tell the court and jury is the result of an injury?

A. No, sir. Some of his postural defect, as you can see it, existed before this accident.

The Court: To what extent, doctor?

A. He had a curvature of the spine and a moderate sway back before the accident, which were symptomatic, and according to his history he has never been bothered by his back previously. He had one accident before, in 1939, I believe, when he was squeezed between a gondola and a barge

(Testimony of Dr. Neil P. McCloy.)

rib cage; but he had no back injury. He does, from side to side, at which time he injured his therefore, give no history of trouble with his back prior to this accident. The postural changes that he had are congenital and are not related to this accident. [233]

The Court: What in your opinion, doctor—this may have been answered, and if it was answered you need not answer it again. What is your opinion as to the prospect of this man returning to a gainful occupation, that is, within the area of his——

A. To his own occupation?

The Court: Yes.

A. I think it is possible in a year or so. I do not believe that it is probable.

The Court: He is a switchman?

A. He is a switchman. Inasmuch as the occupation requires considerable agility.

The Court: Yes. All right. Any further questions?

Mr. Cummins: Yes.

Q. Do you think, Doctor, he will be able to work at that? A. Yes, sir.

Mr. Cummins: That is all.

The Court: Thank you, doctor.

A. Thank you.

(Witness excused.)

The Court: We will take the noon adjournment, ladies and gentlemen, and resume at 2:00 o'clock this afternoon. Same admonition not to discuss the case under any conditions or circumstances or

form an opinion until the matter has been submitted.

(Thereupon a recess was taken until 2:00 o'clock p.m.) [234]

Tuesday, October 3, 1951, 2:00 P.M.

The Court: You may proceed.

Mr. Papas: That concludes the plaintiff's case, your Honor. We rest.

Mr. Cummins: Your Honor, may I make an opening statement?

The Court: Yes.

Mr. Cummins: Your Honor, Mr. Papas and Mr. Michael, and ladies and gentlemen: I will make my opening statement quite brief because you have already heard most of the evidence in this case and I didn't wish to repeat what you are going to hear from plaintiff's witnesses, which I am sure if I had started out at the beginning I wouldn't have anticipated accurately anyhow. So it is just as well I stand here now to tell you what the defendants will prove, what at least I anticipate we are going to prove.

Now, I want to caution you, I am an attorney and just as prejudiced on my side as Mr. Michael and Mr. Papas is on his side and I am guided by the ethics of my profession the same as the other attorneys are, but nevertheless in my zeal I might tell you something that isn't borne out by the evidence. Don't take what I say as evidence. It is just a statement of an attorney. This is what I anticipate the evidence will show.

First of all, we are going to call Dr. Luckey. Dr. Luckey is a doctor at Stockton, California. I took his [235] deposition a few weeks ago thinking that I could read what he had to say to you instead of calling him away from his practice. However, he wasn't cross-examined at that time, plaintiff's counsel requesting that he come to San Francisco. In view of that request I have asked that Dr. Luckey re-examine Mr. Seamas and he did so this morning and had additional X-rays taken.

Now, Dr. Luckey is here and I anticipate that he will testify substantially that apparently Mr. Seamas did have a back sprain from some fall which he has told you about. I think he will classify that back sprain as slight or mild. At the most moderate, that there was no external evidence of injury when he saw him, but because of his complaints of the patient himself he carried out the usual therapeutic measures that an orthopedic physician utilizes. He taped his back and subsequently, because of continued complaints of pain in his back he put him in traction.

Now, traction means simply stretching the legs with a weight and you have probably been in a hospital and seen people in traction. That during that time he found—before he put him in traction he found muscle spasm. After a period of weeks he found muscle spasm, not immediately, no splinting of the muscles to hold the spine straight when he first saw him. But subsequently it developed that he thought there might be muscle spasm there

but that regardless of the fact that he put him in traction and relaxed him in bed for a period of several [236] days the so-called spasm did not disappear so he changed his diagnosis and his opinion. That it wasn't muscle spasm, but it was a voluntary effort to hold the back rigid.

The evidence will continue to show as it has already that there is no evidence of injury in any X-ray. There is the hypertrophic fringing on the body of the third lumbar vertebra which if you were close enough you saw in the X-rays already submitted. Both, those taken after December 9, 1950, and in the only taken in 1939. The evidence will be from Dr. Luckey that that particular 1939 X-ray—he hasn't yet seen the other two—all of the X-rays show either one of two things. A previous compression fracture of that vertebra or—and more likely, a congenital condition of that particular vertebra, or possibly simple arthritis which we almost invariably get in our spine as we get older.

Now, Dr. Luckey is the doctor who treated the plaintiff over a period of several weeks and I think he last saw him in July of this year. Dr. Luckey noted that Mr. Seamas was using crutches and subsequently a cane, and he told him to stop doing it, that it wouldn't help him. I believe the doctor will tell you that as far as any organic injury this day is concerned, that there is none. None. That the disability which Mr. Seamas appears here in this courtroom to be suffering is his own mental attitude which disables him. He is disabled. I think the doctor will you tell you that it isn't necessarily a

voluntary [237] thing on Mr. Seamas' part. These things also can happen involuntarily. Some people are of a makeup, a mental attitude, condition of makeup so that they are suggestible. Mr. Seamas is one of those people.

Dr. Luckey I believe will give you his prognosis. I am unable to give it with any degree of accuracy so I will wait until Dr. Luckey takes the stand and ask him his prognosis, medical terminology which is the outcome of this case, what he thinks is going to happen to Mr. Seamas subsequent to this date, the treatment that he advises, and I will not go into that at this time. He will be the next witness.

Now, so much for the allegation of injury and damages in this case. I will take up now what I think our evidence is going to show you folks on the issue of negligence and liability. I am going to call Conductor Marrs, or Engineer Marrs. He was acting as fireman on the night of the occasion in question. I am going to call him for a very limited purpose, and that is to add one knowledge to the discrepancy in plaintiff's statements that he told everybody about his back injury the night of this so-called accident. Engineer Marrs will tell you folks it wasn't until two weeks later that he knew an accident was supposed to have happened or that the plaintiff claimed that he was injured in any accident. That he was not present sitting, as Mr. Seamas told you, at a table when he told all about how his back hurt him. I am going to call also the engine foreman. [238] The engine

foreman's name is Mahan. You have heard his name before. He will tell you folks what happened within his sight and hearing on the night of this alleged accident. Mr. Mahan was standing in the vicinity of No. 10 switch which is designated on this exhibit 3 as the bull switch. He pushed one car toward No. 9 with a kick move.

Now, we throw a lot of medical terms at you, and legal terms, and then we add railroad terms. A kick move is simply, you have hold of a car with the engine or with other cars and you move forward, and then a switchman grabs hold of what railroaders call a cut lever. It is a lever that sticks out from the coupler to the side of the car, and he gives that cut lever a yank and that separates the cars and it permits the car to drift on down the track—to roll down the track. Drift is another railroad term.

Well, that was done on this occasion. One car was cut off, but there was a little swale there and they sometimes don't kick a car at that particular point hard enough to make it roll as far as they want to go. If they kick it too hard it is liable to run across the yard, particularly if there is no brake at all set up on it. In this instance there may have been a slight brake set on that car. If there was, Mr. Mahan will tell you it wasn't necessary to release it. It was desirable to have it on there so that it wouldn't roll too far. They would give it another kick and shove it where they wanted it to go and it [239] would set there. Brakes on a railroad car aren't like an automobile.

They are steel, iron, press against the wheels. You wear them out very slowly.

Now, he made this one move and pushed this one car not far enough to get it into No. 9 track. He didn't kick another car. He had the whole train come against that car to shove it farther. Now, that move is like this. When they come together they couple up—they may couple up, they don't necessarily couple up; but they are expected to couple up if the coupler is open. If it isn't, they will just be shoved. If it isn't coupled up they have to be cut again. Some switchmen have to pull that switch again. In this instance they went—they weren't open to couple so that when they were cut this car simply went right on down the track where it was supposed to go. Now, it was hit harder, I think Mr. Mahan will tell you this, than should have been if someone was on the other side or blind side of this train and didn't know that the car was going to be hit. It was hit two and a half to three miles an hour, within the permissible limits to prevent any damage to the car or to the cargo that might be in a car. This one, I believe, was empty. But for someone on a ladder unsuspecting the car to be moved it would be quite a surprise.

Mr. Mahan will tell you that the last conversation that he had with Mr. Seamas was when he handed him some instructions [240] as to what to do. The next conversation was five or ten minutes after this alleged accident when Mr. Seamas showed him his leg and said, "Look, I got a scratch. I got knocked off that car." And he made no mention of a back

injury or any other injury, and made light of his scratch. There was no conversation, Mr. Mahan will tell you when these two cars that you have heard in plaintiff's case were supposedly coupled together and plaintiff came over here to see if they were coupled—there was no conversation when, as plaintiff said, he walked east to the end of these supposed two cars and told Mr. Mahan he was going high, to let off their brake. There was no instruction and no permission from Mr. Mahan to go on the blind side of this train to release a brake or to climb up on the car on the blind side of the train. Mr. Mahan will tell you this too. That it is the custom on every railroad in the United States of America to operate on one side of the train, the engineer's side, where signals can be passed. That if, and only if the other members of the crew, the foreman or switchman on the engineer's side knows, is informed that a man is going on the blind side of the train and climb up on the cars, can that man do that unless he takes his own risk and carelessly climbs up when no one on his own side of the train knows that he is going to be there.

Mr. Mahan will tell you he did not know Mr. Seamas had any intention of climbing on the blind side of the train, that he did not know Mr. Seamas did climb up on the blind side of the [241] train, that he did not at any time see a light or reflection of a light on the car on which Mr. Seamas did climb or in its vicinity.

I have fallen heir to the fault all attorneys have.

We talk too much. I am going to say this, that if I prove the facts I have just indicated to you, I am going to ask you for your verdict.

Call Dr. Luckey, please.

DR. C. A. LUCKEY

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you state your name, your address and your professional calling to the court and to the jury?

The Witness: C. A. Luckey, 333 North Sutter, Stockton, California. I practice orthopedic surgery.

Direct Examination

By Mr. Cummins:

Q. You maintain your office in Stockton, doctor?

A. Yes.

Q. You will recall I took your deposition October 2nd—that can't be right——

A. It was some day last month.

Q. About a month ago, September 7, 1951?

A. About a month ago, yes.

Q. About three weeks ago. You weren't cross-examined at that [242] time? A. No.

Q. Have you been served with a subpoena by the plaintiff? A. Yes.

Q. You examined Mr. Seamas this morning, didn't you, Doctor? A. Yes.

Q. Now, without modesty, Doctor, I would like

(Testimony of Dr. C. A. Luckey.)

for you to tell the jury something of your background.

A. Well, let's see. I graduated from medical school, University of Nebraska in 1939. I served one year of internship in the Alameda County Hospital in Oakland; spent three and a half years of training in orthopedic surgery at the Mayo Clinic; spent three years——

Q. In Rochester, Minnesota?

A. Yes. I spent three years doing orthopedics in the army, and I have been in the practice of orthopedic surgery in civilian life for five years.

Q. Have you written anything in the field of your specialty, Doctor?

A. I have written several articles.

Q. Have you had them published?

A. Yes.

Q. Doctor, are you a member of any boards or staffs?

A. Yes, I am a member of the American Academy of Orthopedic Surgery, American Board of Orthopedic Surgery, American Society [243] for Surgery of the Hand, Western Orthopedic Association and the state and local medical societies.

Q. You are authorized to practice in California?

A. Yes, licensed in 1939.

Q. Doctor, have you specialized in any field of medicine? A. Yes, in orthopedic surgery.

Q. What is orthopedic surgery?

A. Well, that has to do with that branch of

(Testimony of Dr. C. A. Luckey.)

service which deals with treatment of injuries of the musculo-skeletal system and associated structures. In other words, the bones, joints, ligaments, tendons, muscles, nerves.

Q. Are you the type of doctor that handles back sprains and back injuries?

A. Yes, we treat those rather frequently.

Q. Have you had many of those in your experience?

A. Well, I think anyone that practices orthopedic surgery sees more low back pains and back sprains than anything else.

Q. What was your experience in the army? What kind of work did you do then?

A. Well, I was primarily doing reconstructive work. That is, treating war casualties.

Q. Over what period of time did you do that?

A. Three years.

Q. Now, what was the occasion of your first seeing Mr. Seamas?

A. Well, I first saw him at his home on the night of December [244] 9th at which time he was complaining of pain in his lower back, and he told me that he had fallen off a boxcar while at work.

Q. How did you happen to be called to his home?

A. Well, to the best of my knowledge I think the patient called me.

Q. You went to his home? A. Yes.

Q. What did you do? Did you examine him?

A. Examined him and taped his back, and I

(Testimony of Dr. C. A. Luckey.)

gave him a prescription for some sedation for some pain pills.

Q. What did he tell you in the way of history, what had happened to him?

A. At that time he told me he was at work when he was knocked off a boxcar and fell. I don't recall any more detailed points but also he told me that he was complaining of pain in his lower back at that time.

Q. Any other complaints?

A. The patient also complained of pain in his left leg although I can't recall if he told me specifically he had pain in the left leg that night, or if he told me when I saw him the next visit which was January 3rd.

Q. All right. Did you look at his knee or something that was scratched, cut

A. Well, I don't recall offhand. I vaguely seem to—well, I am not sure. It was something that half way rings in my mind, [245] but I am not positive.

Q. Was there anything serious about a cut or scratch that you had to treat that night?

A. Not that I recall. I treated him primarily for his back.

Q. Doctor, did you arrive at any diagnosis after your first visit?

A. Well, the patient was complaining of pain in his back and I felt that he had some muscle spasm and I made a note to that effect in the chart. He had limitation of back motion, and he was

(Testimony of Dr. C. A. Luckey.)

tender over the lumbo-sacral area. That is, he was tender over the very low back.

Q. You say he was tender. How did you determine that?

A. That of course is determined by feeling. That is, putting your finger over areas in the back and asking the patient if he feels pain.

Q. Do you have to depend in any degree on the patient?

A. Well, yes, tenderness of course is a subjective affair and you can't determine tenderness by what you feel with your fingers. You have to rely on what the patient says when you feel various areas.

Q. You said he had limitation of motion. What did you mean by that?

A. Well, I meant by that that his back didn't move through—his back didn't move as much as it should.

Q. Is that objective or subjective? [246]

A. Well, of course when you look at it, to the examiner it is objective. To the—

Q. When you see him not move, is that it?

A. Yes.

Q. Is it in any way subjective?

A. Well, of course that is up to the patient. After all, the examiner is merely looking for the range of motion, and if the patient doesn't move as much as he can, why—in other words, there may then be a subjective element to it.

Q. Was there anything that you could see that

(Testimony of Dr. C. A. Luckey.)

you would refer to as an objective symptom that first visit?

A. Well, no, because objective is something like a broken bone or something that you can definitely put your finger on and except for the limitation of motion which is objective on the examiner's part there was nothing else objective.

Q. What was your purpose in taping his back?

A. Well, I felt that the patient had sustained a sprain of the back and of course taping the back would limit the motion of the back. In other words, sprains are treated primarily by limiting motion, by putting them at rest.

Q. Is that the usual treatment for complaints of a patient such as Mr. Seamas' seemed to you?

A. That is one of the forms of treatment, yes.

Q. When did you next see him?

A. Well, then I saw him on January 3rd, at which time he still [247] had a good deal of limitation of motion, and I felt that he was having a definite pain in his back. I felt that he had muscle spasm, and due to the fact that he was having the complaints of pain in the low back with some radiation down the back side of the left leg, I admitted him to the hospital, where we put him in traction. By traction I mean that you put some tape on each leg and then you put a pulley at the end of the bed and put a rope from the tape on the leg through the pulley and at the end of the rope you tie a weight so that there is a continuous

(Testimony of Dr. C. A. Luckey.)

pull on the legs day and night. That, of course, is to put the injured part at rest.

Q. Is that again the type of treatment that you use for complaints that Mr. Seamas was giving?

A. That is one of the standard forms of treatment, yes.

Q. What hospital did you have him in?

A. St. Joseph's Hospital in Stockton.

Q. Now, incidentally, are you employed by the Santa Fe Railway Company? A. No.

Q. Do you regularly treat patients for the Santa Fe?

A. I very rarely treat patients for the Santa Fe.

Q. The Santa Fe did pay you for treating Mr. Seamas?

A. Well, I suppose they paid us. I don't know whether we are paid. I guess we are, though, or I presume we will be paid. That is not my department. [248]

Q. Well, then, did you again see Mr. Seamas?

A. Well, yes. Then we put him in the hospital for—I can't remember exactly the length of time, I would say roughly ten days. Then, of course, the thing that was a bit puzzling is that Mr. Seamas complained of a good deal of pain while lying in bed. Now, it is a well-known thing in medical circles that if a patient has a mechanical back strain at least the symptoms should subside when they are lying quietly in bed or when they are lying quietly in bed and have traction on the legs. Mr. Seamas, after he was there for a while, con-

(Testimony of Dr. C. A. Luckey.)

tinued to complain of pain even though he was at bed rest, and therefore after roughly ten days or something like that, I felt that we would accomplish nothing by further traction, so we discontinued it. The patient still, of course, complaining of pain at bed rest.

Q. Did he have spasm at the time you released him from the hospital?

A. Well, by muscle spasm we mean that the muscle is tight. It is partially contracted through no effort on the part of the patient. His system does that, but he doesn't do it. Now, that is muscle spasm. That is in contrast to voluntary muscular effort, which means that the patient is tightening the muscle himself. Now, of course, it is a difficult task sometimes to tell whether you are dealing with spasm or whether you are dealing with voluntary muscular effort. Now, the first two visits I felt the patient was definitely having spasms. We [249] saw this patient over a considerable period of time. The physical therapists in the office treated him daily over a considerable period of time, then three times a week, and so on. But during all this time he continued to have considerable limitation of back motion.

Well, then gradually it developed, and I can't tell you the exact time when I realized that the patient was no longer having muscle spasm but was having considerable limitation of back motion not due to spasm.

(Testimony of Dr. C. A. Luckey.)

Q. Was he in your charge—I mean, were you the only doctor that was treating him?

A. Yes.

Q. Over what period of time did you treat him?

A. Well, let's see. January through June rather intensely, and then I think about a couple—two or three visits in July. So I treated him pretty intensely over a period of about six months. In addition to the heat and massage, the patient was wearing crutches, which we did not feel was good treatment for a back sprain. Crutches, as you know, are used for leg injuries, but it doesn't work out very well with back pain, and we tried over a considerable period of time to have him discard the crutches, and I finally tried to have him get rid of one crutch, and then the next one. Gradually he did discard the two crutches and used a cane. He complained a lot, and as I said, we did everything possible. We finally [250] fitted him with—let's see, I think he had a canvas belt and I finally fitted him with a metal brace which we call a chair-back brace, which he is wearing at the present time. After he wore that for some period of time we suggested on numerous occasions that he discard the brace and step up the activity, because I felt that after muscle spasm had quieted down that we were developing what we in medicine call a functional overlay. Now, by that I mean that a patient has an injury and then he recovers from that injury but he has developed fixations in his mind so that he continues to have pain in his back. Now, I hope I made that

(Testimony of Dr. C. A. Luckey.)

clear. In other words, it is what is called a neurosis. I feel that at this time the patient is disabled. I think that he has pain in his mind, but I do not feel that he has any organic disturbance in the back. By organic disturbance I mean that I don't think he has any sprain remaining in his back. That decision is arrived at on the way the patient walks, and after all, after you see a lot of the patients with back injury, you see how they walk and then you compare their gait with this patient's gait and the way he places his hands on his hips.

So his gait is one point which makes me feel that he has a neurosis. No. 2, he has as was told to you this morning—he has no muscle spasm at this time, but still he has no back motion. I have seen him on a number of occasions in the office; I examined him again this morning and asked [251] him to bend over and his back does not move. Any bending that he does is done at the hip joint. So he has a fixed back, which is due not to muscle spasm but due to the neurosis. Another very important point, if he were suffering from strain at this time he should have a localized point of tenderness. By that I mean, let us say, that his lumbosacral joint—that is the joint in the low back—was sprained at the time of the injury, and I feel that it was sprained. If he was still having pain from that particular sprain he should have rather localized tenderness. He was examined this morning and again in the presence of both attorneys, and I

(Testimony of Dr. C. A. Luckey.)

think they both saw that this patient's back was very tender from the first lumbar vertebrae to the sacrum. In other words, the back from there to there (indicating) he is very tender, and on the back side from there to there (indicating). In other words, there is an area almost a square foot where this morning I just barely placed my hand on his skin and he complained of a lot of pain. Well, we are dealing with a sprain, we are dealing with structures deeper than the skin, that is, down some distance, and usually even though a patient has a good deal of distress you have to press reasonably firmly to bring forth pain. So that point, alleged tenderness over a very large area, is another point in favor of the fact that he is now suffering from a functional overlay or a so-called neurosis.

Q. Well, Doctor, what can you say about voluntary or [252] involuntary character of a functional overlay?

A. Well, let's put it this way: If we feel that a patient is trying to put the wool over our eyes, if he is lying about the situation, we say that he is malingering. I don't feel this patient is malingering. I think that he has a neurosis. In other words, I rather doubt that he has very much control over the situation. You never know, of course, but a neurosis, a true neurosis, usually the patient at least for the time being has no great control over the situation. That is what distinguishes a neurosis from an individual who is malingering, that is, putting on.

(Testimony of Dr. C. A. Luckey.)

Q. I see. What is the cause of such a functional overlay? What are the causes, if there is more than one?

A. Well, of course, that can be debatable. We might call in general terms as I mentioned in the deposition the other day. We saw a lot of these people in the army. In other words, they developed what in the textbook is called a camptocormia. Camptocormia is an individual who develops a very stiff spine due to a product of his mind, and in the service we saw those people—if there was something beyond that was distasteful, like an infantryman about to go overseas, he might develop it because he was worried about the consequences, and I am sure the literature will bear this out. Those people were discharged, and the discharge from service took care of the situation. In other words, eliminating the factor that was responsible. [253]

Q. You mean they got better? A. Yes.

Q. What is this camptocormia?

A. Well, camptocormia is a condition wherein the patient has stiffness of the back and complains of pain in the back, but has no injury to the back, and the symptoms are the result of his thinking.

Q. Have you told us all the treatment that you gave Mr. Seamas?

A. Well, let's see. I mentioned heat, massage; we gave him a lot of exercises, we told him to gradually increase his activity. He had a support which we have been suggesting that he gradually

(Testimony of Dr. C. A. Luckey.)

get rid of; I mentioned the traction. I think that is it.

Q. Do you feel that he should wear a belt now?

A. Well, I think—here is the point. He has worn that brace over a long enough period of time so—if you put a cast on a leg over a long period of time the muscles are going to get weak, so you have to build them up. I think he should get rid of the brace. True, if he takes the brace off he may have a little distress just from wearing it so long because he has had a limited motion of the back. When you take it off it is going to move, so I think he should get rid of it in a short period of time; discard it completely. I think it would be much better for his back. [254]

Q. Is there anything of significance in the X-rays that you want to comment about?

A. No, there was just—well, there is one point. May I see an old X-ray, or shall I use these?

Q. Doctor, I hand you—here are two X-rays that were taken subsequent to the date of December 9, 1950.

A. Well, there was just one point I wanted to make. I think it was clear that the—the X-rays are negative. In other words, the X-rays don't show anything abnormal so far as this injury is concerned. The question was brought up whether there was any narrowing of one intervertebral disc. People's backs vary. In other words, there are a certain number of them, roughly ten to fifteen per cent, who have a little variation from normal which

(Testimony of Dr. C. A. Luckey.)

is called a congenital abnormality, and that was mentioned previously. Now, this patient has a congenital abnormality. I only mention it because I think the point was raised whether the last—whether there was some thinning of the last disc which is this space that you see down here (indicating). I feel that that space is normal for this reason. That anyone who has a congenital disturbance in the back with a low-lying disc always has a narrow disc. By that I mean this, that normally the last disc you would see would be at this level (indicating), but now you see one down here. In other words, under normal circumstances this would be one and that would be the first one you see (indicating). So the last [255] disc you see in this X-ray is thinner than the one above it, but because it is a low-lying disc it is natural. That is just the normal anatomy of structure.

Q. Now, Doctor, here is an X-ray taken in 1939. Do you notice anything different about it than the one that is already in the box?

A. No, there is nothing different. The only point I am talking about, the last disc, the last cushion—it doesn't show on this X-ray, though.

Q. What about this other one? Let's identify them a little for the record here. The one you had in the box before that was taken subsequent to December 9, 1949, is No. Plaintiff's 5, and the 1939 is Defendant's C.

A. This is plaintiff's No. 6. Well, that shows the last cushion. You can see it better on this film

(Testimony of Dr. C. A. Luckey.)

than you could on the previous one, and you see there is no loss of—in other words, the two bones in the back don't touch here. In other words, you can see the disc space well there. It is the same as the previous one.

Q. Now, following your last examination of Mr. Seamas which you did this morning, can you give us a summary or idea as to what your diagnosis is today?

A. Well, my diagnosis, of course, is functional overlay or a neurosis manifest by limited back motion and back pain.

Q. Have you any treatment to prescribe? [256]

A. Well, I feel that further physical treatment is going to accomplish nothing because we, as I said before, bent over backwards to do everything possible and had the man come in frequently, which we had hoped would be a form of psychotherapy. That is, by getting his confidence and so on, and yet we accomplished, I would say, very little or nothing. So I don't think that further physical treatment in the way of heat massage and so on is going to accomplish anything. Possibly psychotherapy may have accomplished something.

Q. What do you mean by psychotherapy?

A. By psychotherapy I mean having the patient consult a psychiatrist, and have him delve into the situation and see if he can accomplish something.

Q. Would that be treatment for the functional or neurotic element in the case? A. Yes.

Q. May I ask what your diagnosis—what your

(Testimony of Dr. C. A. Luckey.)

prognosis is, the outcome, in your opinion, in this case?

A. Well, of course, as I told you before, and as the medical literature is full of cases like this, they had many cases in the army that cleared up with dismissal from the service, and I can't tell you when this patient is going to clear up, but many times at the termination of a case they do improve.

Q. Do you think he can work?

A. Well, I feel the man can certainly do light work. I don't [257] know about—I don't think that he is capable of doing work that calls for any physical activity of significance because he still has his fixation on his back.

Q. Have you an opinion as to his ability to return to work as a switchman sometime in the future?

A. Well, I can't recall ever seeing the literature where a camptocormia ever persisted. In other words, I can't honestly say that anyone ever had a condition like this and never got over it. In other words, they get over it. They clear up. They disappear.

Q. You noted Mr. Seamas' posture. Could you tell us, is that camptocormia?

A. Yes, camptocormia is—the posture is one of the significant things, not particularly holding the hands on the hips, but the sort of forward tilt and sometimes tilting off to the side. Sometimes it will even go to the point where they hold their neck and

(Testimony of Dr. C. A. Luckey.)

head stiff so that they move the entire body when they look around.

Q. Is there anything about this congenital thing that you pointed out to us that has any effect on camptocormia?

A. No, I don't think it has any significance.

Q. What about his posture? What is the cause of his posture? Is camptocormia the full answer or partial answer?

A. Well, I think the patient has more swaybackness than normal. In other words, we don't all have perfect posture. He is more [258] swaybacked than average, so to begin with he is more swayback than normal, but that doesn't account for the complete posture. The second phase of the posture, that is, the forward tilt, of course, is the position all camptocormias get in. Now, you say, well, why does he walk that way rather than leaning toward the north, or south, or right, or left? Well, I don't know. That is just the way they end up.

Q. I have neglected to ask you this, about this—I don't know what to call it, on the third lumbar vertebra. Do you know what that is or have you an opinion as to what it is?

A. That could be one of two things. It could be as was mentioned previously, it could be the result of a very old compression fracture or it could be developed mental. By developed mental I mean that there is a small growth center in that part of the bone and when the bone grows it sometimes grows out a little more prominently at one corner

(Testimony of Dr. C. A. Luckey.)

than it does at the rest of the bone, so it could have developed mental. That is, been there since birth. Or it is possible that it could have been due to some mild compression. I would say if it is due to a compression it would have to be that it would have occurred a number of years before that last film of 1939.

Q. I have told the jury that there might be another alternative, that is, arthritis. What about it?

A. Well, this man is 37 now. That X-ray is 11 years old. You see, he would be rather young for arthritis. It is [259] possible but highly improbable, I would say. It would make him in the neighborhood of 25 or 26, somewhere in there. That is a little bit young for arthritis.

Q. I will stick to being a lawyer hereafter. That is all. Cross-examination.

Cross-Examination

By Mr. Papas:

Q. I won't keep you too long, Doctor. I understand you are rather anxious to get back to "God's country," as you put it. Now, Dr. Luckey, you stated that you examined Mr. Seamas on the evening of December 9 of 1950? A. Yes.

Q. What time was that, sir?

A. Well, gee, I don't know. You know, that has been a long time ago and a lot of patients have been seen since, and I—I don't know.

Q. You recall it was at night, is that correct?

A. Yes.

(Testimony of Dr. C. A. Luckey.)

Q. And did you have your medical kit with you when you went out to see him?

A. Well, I presume so, because I taped his back.

Q. I see. Well, may I refresh your memory, Doctor?—it was around Christmas time. Isn't it true, as a matter of fact, that you were at a party and his neighbor called you, and you made an appointment with him at your office at about 11 o'clock that night? [260]

A. At my office?

Q. Yes, sir.

A. Well, it seems to me I saw him at his home the first time, December 9th.

Q. Would it be possible that you were at the party and were called and met him at your office?

A. Well, I don't know. It is possible, yes. It seems to me I saw him at the home the first time and in the office the second time, although it could have been at the office. As I say, I just—I saw him once place or the other December 9th, I know that.

Q. Now, Dr. Luckey, are you positive that he was wearing crutches?

A. When?

Q. Are you positive that he was using crutches after you saw him the first time?

A. Oh, no, no. He didn't start using crutches until after he was—oh, as I recall, I think he was out of traction before he had crutches.

Q. In other words, he had been released from the hospital by you and then you saw him with crutches?

A. Yes, as I say, I can't recall the exact time the crutches were worn, but to the best of my

(Testimony of Dr. C. A. Luckey.)

knowledge some time after the dismissal from the hospital, I think.

Q. You state that you saw him for a period of time and he was [261] using crutches?

A. Yes, he was—well, he came in the office, oh, daily for some period. That is, daily through the working week, and as I say I can't tell you how long the crutches were worn, but he used the crutches, yes.

Q. And you can't say definitely whether he used them for a week, or a month, or two months, or three months?

A. Well, no, I don't know the exact time. I know that it was definitely over a week, though.

Q. I see. Now, Dr. Luckey, you stated that you have not been paid?

A. No, I didn't say that. I said I don't know whether we have been paid or not.

Q. In other words, you haven't checked your records?

A. I haven't checked the—what we call the business office records.

Q. I see. And do you keep that, or one of your girls keeps it? A. One of the girls keeps it.

Q. I take it if you haven't been paid you expect to be paid?

A. Absolutely, we are not working for charity.

Q. Now, Dr. Luckey, you stated that you next saw him on January 3rd of 1951; is that correct?

A. Yes.

Q. And do you know who was treating Mr.

(Testimony of Dr. C. A. Luckey.)

Seamas between December 9 of 1950 and January 3 of 1951? [262]

A. I think Dr. Weiss was, of Stockton.

Q. Do you know, Doctor, just of your own knowledge, as to whether or not he was receiving any type of treatment from Dr. Weiss?

A. No, I don't.

Q. You don't?

A. I don't know what Dr. Weiss was doing.

Q. Did he discuss with you the type of treatment that Dr. Weiss was giving him?

A. Well, he might have, but if he did I don't recall it.

Q. And now when he came back to you on January 3 of 1951 did he come back to you on his own volition or was he sent to you by the Santa Fe Railroad?

A. Well, you asked me that the other day, and I—as I said, I am not sure whether he came to me directly or whether he was referred.

Q. Can you tell us, Doctor, whether you talked to any claims adjuster or anyone from the Santa Fe Railroad before January 3 of 1951?

A. Well, I rather doubt it. I talked to Mr. Anderson somewhere along the line—frankly, I don't know when I talked to him first. Well, I really don't know when I talked to Mr. Anderson the first time.

Q. There is nothing in your record to indicate when you first talked to him? A. No. [263]

Q. I see. And, Doctor, did you consider Mr.

(Testimony of Dr. C. A. Luckey.)

Seamas after he came back to you on January 3rd as your patient?

A. Oh, yes, yes. I think the record will show how many times we have seen him here.

Q. Doctor, in the ordinary course of events, if I were to come to you as a patient there is naturally a confidential relationship between you and me, is there not?

Mr. Cummins: Object to that. I think the case opens up that provision of confidence.

The Court: Ordinarily there is a relationship of confidence, but when a witness is called, the privilege is dispensed with ordinarily.

Mr. Papas: Yes, we realize that, your Honor.

The Court: Do you have some other point in mind?

Mr. Papas: Yes, sir, I do.

The Court: Well, I will tell you, we might take the recess period and discuss it. Ladies and gentlemen, may I ask you not to discuss the case under any conditions, or to form an opinion in the matter until it is submitted to you. We will take the afternoon recess and I will discuss these matters with counsel.

(Thereupon the jury was excused. Thereafter an unreported discussion was had between Court and counsel.)

(Short recess.) [264]

Mr. Papas: In order to save time, your Honor, may we introduce this original deposition taken of

(Testimony of Dr. C. A. Luckey.)

the custodian of records at St. Joseph's Hospital in Stockton?

The Court: So ordered. No objection, counsel?

Mr. Cummins: Your Honor, maybe I had better look at it first.

The Court: I assumed you had seen it.

Mr. Cummins: I glanced at it, but I did not really look at it.

The Court: All right, I will reserve ruling pending your review of it.

Mr. Papas: Thank you, your Honor.

Cross-Examination

(Continued)

By Mr. Papas:

Q. Dr. Luckey, do you have your records of this matter with you? A. Yes, sir.

Q. May we see those, please?

A. (Handing document to counsel.)

Q. Thank you. Dr. Luckey, this history which you took of Mr. Seamas, was that taken by yourself or by the office help?

A. Well, the writing in there is partly office help, yes.

Q. It is a combination, then?

A. Yes, part of that is the office help.

Q. Dr. Luckey, when you saw him the second time on January 3, 1951, do you recall whether you gave him a complete examination [265] on that occasion?

A. Well, I will say this, that I examined the part involved. I can't remember offhand about the

(Testimony of Dr. C. A. Luckey.)

complete part. I checked him somewhere along the line, but I remember the third of January is when—I know I examined his back at that time because I have a note of it there that he has a great deal of muscle spasm at that time.

Q. You don't recall offhand the date that you sent him to St. Joseph's Hospital for traction?

A. I think it was January 3rd, but it is right there, more or less.

Q. As soon as Mr. Cummins is through, perhaps this will refresh your memory. May we wait a moment, your Honor?

The Court: Yes.

Mr. Cummins: Your Honor, there is a letter in the record which is probably a confidential letter under the doctrine of City and County of San Francisco versus Superior Court, decided this year. However, I have no objection.

The Court: It may be marked in evidence.

(Deposition of custodian of records, St. Joseph's Hospital, was admitted into evidence as Plaintiff's Exhibit No. 7.)

Q. (By Mr. Papas): Would you be good enough to look over this deposition, Doctor? Perhaps that will refresh your memory as to the date he was hospitalized.

The Court: Can you stipulate to that date, counsel, please? [266] You know the date?

Mr. Cummins: Certainly.

Mr. Papas: I am sorry, sir, I don't know.

(Testimony of Dr. C. A. Luckey.)

Mr. Cummins: Whatever it may be.

A. It is January 3rd, more or less.

The Court: Subject to correction, let's state the date as January 3rd. The doctor may correct it if you find it. Then we will get along, otherwise we will be bogged down.

Mr. Papas: All right, your Honor.

Q. Can you recall whether or not, Doctor, on or after that date you submitted a medical report to the Sante Fe?

A. Well, I sent so many reports on Mr. Seamas. I had blanks, railroad retirement, things like that, I have sent so many that I can't tell you what dates I sent them, but I know I sent an awful lot of reports.

Q. Do you recall whether or not you sent a medical report to Mr. Anderson?

A. Well, I know I have sent a report to him sometime, but I can't tell you exactly. Do you have a copy of one on that date?

Q. Yes. It is photostated here, Doctor.

A. Well, if that is, that is it. This is the date, January 4th, yes, to Mr. Anderson, yes.

Q. Would you like to refresh your memory as to that report, Doctor? A. All right. [267]

Q. And would you be good enough to tell us what your diagnosis was at that time when that report was made?

A. As I stated before, I felt this patient had a strain of the lower back towards what we call the

(Testimony of Dr. C. A. Luckey.)

lumbo-sacral—in other words, what we call a lumbo-sacral strain.

Q. And, Doctor, since that time you have stated that—or perhaps I am in error—you felt in that report that that was due to muscle spasm?

A. No, muscle spasm is just another manifestation of a strain. A strain is a pulling of the ligaments, really, then the muscle spasm develops to splint the injured part.

The Court: Doctor, will you explain that to the jury, the physiological reaction so far as the muscle is concerned, whatever it may be?

A. Yes. A sprain is to some ligament, and we are talking about a sprain of the lower back. Any sprain does better for rest, and muscle spasm is an act on the part of the body to make the muscles tighten up, in other words, contract partially so that the injured part will not move. That is muscle spasm. It has nothing to do with the individual. He does not control that.

The Court: Nature automatically provides that defense, isn't that correct? A. Yes.

The Court: All right.

Q. (By Mr. Papas): May I have that a moment, Doctor? Now, [268] Doctor, after he was released from St. Joseph's Hospital, I see your records that he continued to receive physiotherapy treatments from you, is that correct? A. Yes.

Q. Would you be good enough to tell us what those are, what physiotherapy means?

A. Well, in this case, limited to this case, it

(Testimony of Dr. C. A. Luckey.)

means the application of heat to, of course, relax muscles and increase the blood supply to the part. And again, we have massage to, again, do the same thing, to stimulate—to relax the muscles. And also gradually we suggest increased activity with exercises, and doing more little things around the house. In other words, heat, massage and activity is what physiotherapy refers to in this case.

Q. You stated that at first you saw him almost every day this morning for a period? A. Yes.

Q. Then later on you decreased that and saw him approximately twice or three times a week?

A. Roughly, yes.

Q. And the physiotherapy was administered to him at your office, is that correct? A. Yes.

Q. And do you recall when the last physiotherapy treatment was given him? [269]

A. I think it is marked, if you will read it off. Probably June, June 25th.

Q. As late as June 25th—I take it that is 1951?

A. Yes.

Q. He was still receiving these physiotherapy treatments by your office? A. Yes.

Q. And these treatments, I take it, Doctor, were under your supervision? A. Yes.

Q. I take it, too, that the girls in your office were doing the work which is required in this physiotherapy treatment? A. Yes.

Q. Now, Doctor, you stated that you submitted a number of medical reports to, you say, his insurance company?

(Testimony of Dr. C. A. Luckey.)

A. No, the Railroad Retirement Board.

Q. The Railroad Retirement Board, excuse me. And do you have anything in the records to indicate?

A. I don't think so. That is on a double blank I fill in and I don't think they are in there. A blue sheet—I don't know. Well, here is one that the girl made a copy of on January 9th. And many times I wrote them out, because it was a duplication, you know, every week. I don't even—I think they come in once a week, or something like that, and many times I just wrote them out and sent them in. So she has a [270] copy here—after so many duplications, why, you quit duplicating.

Q. And, Doctor, do you recall whether or not in any of those reports you stated that he was suffering from a lumbo-sacral strain?

A. You mean in so many words? That I put down lumbo-sacral strain? Well, let's see that report that you just showed me there on January 4th. I am sure it is in some of the reports. Well, on this report I didn't put down as such in so many words, but I inferred it here in the discussion.

Q. Do you recall when the last report was, Doctor, that you sent to the Railroad Retirement Board stating his physical condition? Do you have anything in your record?

A. No, but I am quite positive on the last report which—well, it was still when we were treating him. I am sure I put down he was still disabled, just as I said he was still disabled now.

Q. Doctor, a patient having received an injury

(Testimony of Dr. C. A. Luckey.)

of the type Mr. Seamas has received, is it possible he may have suffered some traumatic neurosis as a result of it?

A. Yes, that is the same as saying a functional overlay. That is why we use the simplified term "functional overlay." We use the term overlay because it is a carrying over, and you have difficulty—like in this instance, I can't tell you that on June 1st or April 1st, or something like that, his [271] back was OK from a spasm standpoint, and from then on the functional element started. It is what we call an overlay. One just fades into the other.

Q. They combine, in other words?

A. Well, yes, you might—well, that is, I suppose, in part the case. It isn't exactly combined, but, well, as I say, one fades into the other.

Q. Does that happen frequently in persons who have been injured? ..

A. Well, no, I wouldn't say frequently. It happens, yes, but not frequently.

Q. I see. And, Doctor, X-rays do not show any injury to ligaments, tendons, muscles, do they?

A. No, that is right.

Q. They do not? You have to rely primarily upon your technique that you use in determining whether or not there has been any injury to the tissue? A. Yes.

Q. And X-rays would not show any injuries or derangements to an intervertebral disc, would they?

A. As a rule, no.

Q. Dr. Luckey, a person you say who voluntarily

(Testimony of Dr. C. A. Luckey.)

contracts his muscles has what you called what, sir?

A. Well, we refer to it as voluntary muscular effort.

Q. I see. In other words, if I were to flex my muscles here [272] and hold them tight, that would be voluntary muscular effort? A. Yes.

Q. Is that possible in the lower portion of the back, Doctor? A. Oh, it is possible, yes.

Q. It isn't as rigid, is it, as in other parts of the body? A. No.

Q. In other words, it is more difficult for the patient to go ahead and voluntarily flex his muscles in the back than it is in other portions of the body, is it not?

A. Well, that is true, speaking of people in general, I would say, yes.

Q. Dr. Luckey, you testify in these cases quite frequently, do you not?

A. Well, not any more than I can help.

Q. I see. I take it you come into court quite frequently?

A. I come with great reluctance.

Q. And I take it that in most instances when you are in court, you are in court for the defendants?

A. Well, I wouldn't say most. I would say more so than the plaintiff.

The Court: What was that answer, Doctor? I didn't hear.

A. I would not answer the question by saying

(Testimony of Dr. C. A. Luckey.)

“most,” but I probably appear for the defense more than the plaintiff. Put it that way.

The Court: That is in the courts in and about San [273] Joaquin County?

A. Yes.

The Court: I have never seen you before, Doctor, in these courts.

Q. (By Mr. Papas): You are what is known as a defense doctor, is that correct, if I may use that expression.

A. Well, I don't know that I would say that. I have come into court innumerable times when I have been the only doctor testifying.

Q. How many times have you appeared in court this year, if you recall, Doctor?

A. Well, let's see, I was—about four months ago I went once. Well, two and not over three. Maybe two times. That of course does not include industrial accident hearings, which I get called on occasionally.

Q. I take you examine a number of patients for insurance carriers? A. Yes, quite frequently.

Mr. Papas: No further questions, Doctor.

Redirect Examination

By Mr. Cummins:

Q. Doctor, I neglected to ask you if you had in hand any X-rays when you examined Mr. Seamas. Did you have the benefit of any X-rays?

A. Well, at the original time I sent the report

(Testimony of Dr. C. A. Luckey.)

I only had the report and the X-ray wasn't mailed to me at that time. [274]

Q. When did you first see X-rays?

A. Oh, sometime during the time that he was hospitalized.

Q. Do you have those X-rays with you?

A. Yes.

Q. May I see them? Can you tell us just what the date is on them?

A. These X-rays were taken by Dr. Colver, Roentgenologist at Stockton, on December 11, 1950.

Q. And you got them a matter of a few weeks later or a few days later?

A. Not a few days, because I saw him—I saw these sometime about the time we put him in traction. I don't know the exact date.

Q. All right. I didn't ask you to tell us what in your opinion was the degree of sprain here. Can you tell us something about that?

A. Well, I would say not, certainly not over moderate at the most, basing it on mild, moderate and severe. At the very strongest I would not say over moderate.

Q. Have you ever appeared as a witness at the request of the Sante Fe Railroad Company before?

A. No, I have not.

Mr. Cummins: That is all.

Recross-Examination

By Mr. Papas:

Q. Excuse me, Doctor, one more question: [275]

(Testimony of Dr. C. A. Luckey.)

Doctor, do you recall whether you measured the limits of flexion, motion that he has in his back?

A. No. The whole thing is this: by measuring motion, you measure it like this, you measure it primarily by having the patient bend forward and see how far his fingertips will come from the floor. Well, in this case every time I have looked at his back there has been, as there was today, no back motion. In other words, the motion is all in his hips, if you know what I mean, so, as your associate saw today, there was no back motion and so you can't measure the fingertips coming within so many inches of the floor because it has no significance in the back in the moving because it is all hip motion.

Mr. Papas: I see. No further questions.

The Court: The doctor is excused.

A. Thank you, sir.

(Witness excused.)

Mr. Cummins: Mr. Marrs.

BOND H. MARRS

called as a witness on behalf of the defendant, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. My name is Bond H. Marrs. My address is Box 374, Riverbank, California. I am a locomotive engineer. [276]

(Testimony of Bond H. Marrs.)

Direct Examination

By Mr. Cummins:

Q. Mr. Marrs, were you the engineer on the train on December 9, 1950, at Stockton, in which Mr. Seamas was a member of the crew?

A. I was.

Q. When did you first learn that Mr. Seamas claimed there had been an accident and that he had been injured?

A. Well, it would be about ten days after the 9th. It would be about 19th or 20th. I wouldn't say for sure, but the first time I heard of the accident was a message I received from the master mechanic, and he wanted to know, or requested me to fill in the company forms and send them to him concerning the accident.

Q. Did you go to the switch shanty or to the switchmen's locker room at any time of the evening of December 9, 1950?

A. During the evening I probably did.

Q. Did you go there after you tied up?

A. Well, upstairs. We are required by company rules to sign certain forms on completion of shift.

Q. Did you hear Mr. Seamas make any remark about having been injured on that date?

A. No, I did not.

Mr. Cummins: You may cross-examine.

(Testimony of Bond H. Marrs.)

Cross-Examination

By Mr. Michael:

Q. Mr. Marrs, where did you go over you [277] tied up that night?

A. I went directly home. I live 30 miles from Stockton and I am usually in a hurry to get there, in other words, to get on the way home.

Q. Excuse me, perhaps I didn't make my question clear. I mean after you finished switching where did you go? You say you finished in the yard. What other part of the yard did you go?

A. Well, the part of the yard where we tie up isn't in that diagram. It would be about a mile from that designated east shanty there. That is the extreme east end of the yard.

Q. What building did you go into at that time?

A. I believe it is called the yard office. Mormon yard office.

Q. Mormon yard office? That has an upstairs and a downstairs? A. That is correct.

Q. Did you go in the upstairs of that building?

A. Yes, sir.

Q. Did you go to the downstairs?

A. Well, I don't believe I did, because, like I stated before, when we tie up that is the end of the shift and I am in a hurry to go home, and I believe I went directly to my car and went home.

Q. You say you believe. You are not sure, then?

A. It is too long ago. I wouldn't—there was nothing occurred that evening to recall an incident

(Testimony of Bond H. Marrs.)

to my mind, and I [278] believe I went directly home.

Q. And you could have come downstairs, but you don't remember, is that the gist of your testimony?

A. I could have, yes.

Mr. Michael: No further questions.

Mr. Cummins: That is all.

The Court: The witness is excused. Thank you.

(Witness excused.)

Mr. Cummins: Mr. Wilson, please.

NEIL WILSON

called as a witness on behalf of the defendant, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. My name is Neil—N-e-i-l—Wilson—W-i-l-s-o-n, and my nickname at the railroad is Tug.

The Clerk: And your address?

A. 2107 North Orange, Stockton, California.

The Clerk: Your occupation?

A. Trainmaster of the Atchison, Topeka and Sante Fe Railroad.

Direct Examination

By Mr. Cummins:

Q. Mr. Wilson, are you familiar with an Ajax type brake? A. Yes, sir.

Q. How long have you been familiar with an Ajax type brake? [279]

(Testimony of Neil Wilson.)

A. Well, I have worked for the Sante Fe Railroad for 41 years, and during my tour of duty I have been a switchman, engine foreman, yardmaster, brakeman, fireman, conductor, and my present occupation, trainmaster.

Q. Have you been familiar with an Ajax type brake for a number of those years?

A. Yes, sir. I have handled a number of them during my tour of duty as a switchman.

Q. I show you a book here. Is that a fair drawing of an Ajax type brake? A. Yes, sir.

Q. If you don't mind holding that big volume for a minute, can you tell us what the top of the wheel, where it comes to on a boxcar?

A. This Ajax brake is located at the end of a boxcar, and the wheel of it is a few inches above the top of the car, close to the running board or footboard that is on a boxcar for the switchmen to walk over back and forth.

Q. Is there a picture in that big book there of how they look on a boxcar?

A. Yes, sir. There is one (indicating).

Q. This one right here? A. Yes, sir.

Mr. Cummins: Your Honor, this is a compendium of railroad equipment, but I wonder if we might not pass it to the jury [280] just for the purpose of illustration.

The Court: You may.

Mr. Cummins: (Showing document to counsel.) On page 1042 is a picture at the top of the page of

(Testimony of Neil Wilson.)

an Ajax brake on a car, and on the preceding page is the kind of a detailed cut of the brake.

The Court: The jury may see the illustration.

Mr. Cummins: That is in "Carbuilders Encyclopedia, 1943." (Handing book to the jury.)

Your Honor, shall we wait while it is being viewed by the jury?

The Court: I think you might proceed, counsel.

Q. (By Mr. Cummins): Can you tell the jury how that brake operates?

A. Yes, sir. The Ajax brake which is used at the present time, and which all switchmen and railroadmen are very happy to have applied, this Ajax brake has a wheel and it has a lever on the top that is a ratchet, and it is very easy for a switchman to give this wheel a pull with one hand, and as he pulls it up this ratchet catches all the time, and it is very easy to handle a boxcar and stop the boxcar. And to release the Ajax brake, a switchman or brakeman, all he has to do is reach over and take hold of this handle and pull it over and it trips it automatically and the Ajax wheel spins and releases the brake. [281]

Q. Where does a switchman have to get on a boxcar to release an Ajax brake?

A. Well, I have applied an Ajax brake a number of times during my tour as switchman, and I can set a handbrake from the side of the car by just reaching over and pulling the wheel.

Q. Release it, not set it.

A. I can stand on the side of the car at the top

(Testimony of Neil Wilson.)

and reach over and pull the wheel open and the wheel spins and releases the brake.

Q. Is there any necessity to climb on the brake platform to do that?

A. With an Ajax brake, no, sir, because the Ajax brake don't have to come by the wheel on top of the car with a part about two and one-half feet where there is cogs that you have to twist to brake and these cogs set into holes. On an Ajax brake you release the lever and the brake spins.

Q. Now, can you release an Ajax brake from on top of the car or from the catwalk on top of the car?

A. Yes, sir.

Q. How do you do that?

A. Get hold of the lever and trip it.

Q. Do you have to get down on your hands and knees?

A. No, sir, I wouldn't have to.

Q. Now, one other thing, Mr. Wilson. Were you present at the station, the railroad station platform early in January of [282] this year with Mr. Anderson, Mr. Seamas, and Mr. Patterson or Peterson?

A. Yes, sir, I was on the platform.

Q. Did you have passes or anything like that for anyone?

A. Yes, sir. On this date Mr. Patterson and Mr. Seamas came down to the Sante Fe depot. I had a pass to Los Angeles, I had a permit on our streamlines train for Mr. Seamas to go to the Santa Fe Hospital for attention. I asked him if he wanted to go to Los Angeles, and I also told him if he didn't wish to go to Los Angeles, that if he would pick

(Testimony of Neil Wilson.)

out any hospital in Stockton or any doctor that he desired, that the Sante Fe Railroad would take care of the expenses.

Q. What did Mr. Seamas say?

A. Mr. Seamas said that he would rather stay at home because his wife lives in Stockton and he was among friends, and he would rather stay there and go to a hospital there. I told him to name any hospital in Stockton and name any doctor of his choice and we would take care of the bill. I was representing the Sante Fe Railroad at that time.

Q. What did he say?

A. He said he would rather stay home, and he suggested Dr. Luckey as his doctor, as we agreed.

Mr. Cummins: That is all. You may cross-examine.

Cross-Examination

By Mr. Papas:

Q. Mr. Wilson, your testimony is that you [283] knew of an Ajax brake as approximately a few inches from the top of the boxcar?

A. On this particular diagram that the jury has it shows a few inches. They are not always standard.

Q. They are not always standard?

A. Because there are different locations. But as a rule, on a boxcar they stand, oh, I would say six, eight inches above the top of the boxcar.

Q. Do you know from your own knowledge whether you have seen the particular boxcar that Mr. Seamas was hurt on?

(Testimony of Neil Wilson.)

A. I don't know the number of the boxcar that Mr. Seamas was hurt on.

Q. So you don't know how far it was on that particular boxcar from the top of the boxcar, do you?

A. I know they are usually located that position in which they show on the diagram.

Q. But you don't know whether it was in that position on this particular car, do you?

A. No, sir, I didn't not make an inspection of the car.

Q. Mr. Wilson, you testified that you can set this handbrake on the side? A. Yes, sir.

Q. And you don't have to climb the brake platform in order to set it? A. No, sir. [284]

Q. Or to release it?

A. You can stand on the side of the car and reach over and get the wheel, and it is a ratchet brake and all you have to do is pull it with one hand. You hold onto the top grabiron with one hand as you pull up, and the chain tightens and automatically locks. When you release it, all you have to do is pull the handle open and the brake wheel spins.

Q. What is the brake platform used for, then?

A. Well, it might be used, if you were going to ride a car a long distance, or wanted to make a join of cars that you didn't want to disturb the contents, you could ride on there and then come down and make a join very carefully.

(Testimony of Neil Wilson.)

Q. Couldn't you do the same thing, sir, by riding on the grabiron?

A. You can either way, yes, sir.

Q. Do these Ajax brakes and the chains and pulleys which they have occasionally stick, Mr. Wilson?

A. Well, they don't very often because all our cars our inspected over at the inspection tracks, and any defects in brakes are immediately handled by the mechanical department.

Q. May I ask you, sir, in your experience as a switchman and in handling this type of Ajax brake, whether it has very often stuck?

A. I don't think I have ever had a failure with an Ajax brake. I have had failures with other brakes, but not the Ajax brake. [285]

Q. Do you recall whether you have ever used the particular type of Ajax brake from the brake platform?

A. Yes, sir, I have used the same kind. There is only one Ajax brake, and the diagram is in the book. It has to be that particular brake to be called an Ajax brake.

Q. In other words, there are several ways of skinning the same cat, isn't that right?

A. I don't know.

Q. You can set and release this particular type brake in a number of ways?

A. That is right. You don't necessarily have to get on the end of the car.

Q. You can do it——

(Testimony of Neil Wilson.)

A. Do it from the side.

Q. You can do it from the top? A. Yes.

Q. And you can do it from the brake platform?

A. If you are so minded you can get on the platform, yes.

Q. On this particular day, Mr. Wilson, you saw Mr. Seamas and Mr. Patterson there at the train station, you stated that they were going to Los Angeles? A. Yes, sir.

Q. Did I understand you correctly?

A. I understood he was coming to the Santa Fe Hospital, and I made arrangements to transport him on the train, and also a [286] permit which would entitle him to ride the Golden Gate train.

Q. Was Mr. Anderson, the Santa Fe claims adjuster, there? A. Yes.

Q. He was? Was anyone else there?

A. Mr. Patterson came down with Mr. Seamas, yes.

Q. Isn't it true, as a matter of fact, Mr. Anderson, the claims agent, did all the talking?

A. He did part of it, true; and I also followed it up because I was interested in Mr. Seamas due to the fact that he is under my jurisdiction as a switchman and I wanted him to have the best attention the Santa Fe could give him, sir.

Q. And from whom had you received the authority to have him hospitalized at the place he desired and sent to the doctor he desired?

A. Who did I have authority?

Q. Yes.

(Testimony of Neil Wilson.)

A. I have the authority from the Santa Fe Railroad. I represent them. I have that authority given to me through my position.

Q. Isn't it true, as a matter of fact, it was Mr. Anderson, the claims agent, that told Mr. Seamas that he could remain in Stockton and continue with Dr. Luckey?

A. Yes, sir, and I also followed it up to tell him the Santa Fe was willing, more than willing, to cooperate.

Mr. Papas: Thank you. [287]

Mr. Cummins: Thank you.

(Witness excused.)

The Court: It is now four o'clock. We will take an adjournment until tomorrow morning at ten o'clock, and I admonish the jury, as I have in the past, not to discuss the case under any conditions or circumstances, and not to form an opinion until the matter is finally submitted to you. I would like to discuss some matters with counsel, briefly. The jury may retire.

(Thereupon, the jury retired from the courtroom.)

The Court: Gentlemen, I assume we have reached the end of the evidentiary aspects of the case?

Mr. Cummins: Very close. One more witness.

The Court: You will have rebuttal?

Mr. Papas: I don't think so, your Honor. We

may have a rebuttal witness, depending on the outcome of this witness.

(Discussion between Court and counsel omitted upon request of counsel.)

The Court: All right, we will adjourn until tomorrow at ten o'clock.

(Thereupon, an adjournment was taken until Thursday, October 4, 1951, at 10:00 a.m.) [288]

October 4, 1951—10:00 A.M.

The Court: You may proceed, counsel.

Mr. Cummins: Call Mr. Mahan.

L. E. MAHAN

called as a witness on behalf of the defendant, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

The Witness: L. E. Mahan, 2235 East Alma Street, Stockton, California; switchman and engine foreman.

Direct Examination

By Mr. Cummins:

Q. Mr. Mahan, you are employed by the Santa Fe Railway Company, of course, aren't you?

A. Yes, sir.

Q. You were the engine foreman the night of December 9, 1950, when Mr. Seamas claims he was knocked off a car?

A. Yes, sir.

(Testimony of L. E. Mahan.)

Q. What are your duties? Tell the jury what your duties were and are as an engine foreman?

A. Engine foreman's duties is to take care of the work with the switch list and place the cars in the right track that they belong in.

Q. Are the boss of the crew?

A. And I have charge of the whole crew.

Q. In switching service? [289]

A. Switching.

Q. How many years' experience as a switchman have you had?

A. Thirty-five years actual experience.

Q. Now, Mr. Mahan, tell us please, sir, what the duties of a field man are?

A. Well, the field man's duties is to line up switches when he has no cars to ride and set brakes and assist out in the field.

Q. Where does the pin puller work?

A. He works near the engine—be right ahead of me; right ahead of the foreman.

Q. Where does the foreman usually work?

A. Well, he usually works at the end of the cut there to through some of the switches. For instance, that throwing of No. 10 switch there, the foreman generally always throws it.

Q. The field man goes to other points to throw switches?

A. Well, he lines up down the lead when he has a chance, when he is not riding cars.

Q. Mr. Mahan, would you tell us what moves you made with your cut of cars on that night?

(Testimony of L. E. Mahan.)

A. We came out of the rip track with about seven or eight cars.

Q. Then what did you do?

A. First of all I gave Mr. Seamas a list of what tracks these cars was to go to, and also I gave a list to the pin puller each [290] time how many cars to cut off.

Q. Where was Mr. Seamas and where were you when you gave the list to him?

A. We was down there somewhere around the rip track.

Q. Where did you next see Mr. Seamas or notice him?

A. Well, when we pulled up the lead there he dropped off at No. 9 switch and lined it up for No. 9.

Q. Where were you then?

A. I was up there at No. 10 switch.

Q. Then what happened? What went on after that, what moves you made, I mean?

A. We pulled up, I would say three car lengths up over No. 10 switch and I had one car to go to No. 9 and we give it a kick, you know, and it happened it didn't roll in the clear—went down about No. 7 switch and stopped.

Q. All right, now would you tell us, describe for us just what a kick move is?

A. Well, it is a quick move—a speed-up of box-cars, speed them up, you know, to kick them in the clear.

Q. Well, tell us just what process takes place

(Testimony of L. E. Mahan.)

when you make such a kick move? What happens? What goes on?

A. Well, usually the car goes in the clear in the track it is intended to go in.

Q. What does the engine do, I mean, what do you do and what does the pin puller do? [291]

A. He cuts the car off, pulls the pin on it.

Q. Well, do you bump the car hard enough to make it roll two or three hundred feet? How do you make that kick move?

A. We couple into the car and give it another kick the same as I did the first time.

Q. Well, then, to make a kick move you first couple into the car? A. Yes, that is right.

Q. And then what do you do after you have coupled into it? A. We give it another kick.

Q. Give it a push? Does kick and push mean—

A. Well, it is pushing, but it is a little faster than pushing; kicking.

Q. I see. Then does anyone have to uncouple the car?

A. Oh, yes, the pin puller pulls the pin on it.

Q. Now, you told us that you kicked one car to No.—you meant for it to go to No. 9 track but it stopped about No. 7 switch?

A. Somewhere in that neighborhood, yes; didn't clear the other lead.

Q. Then what did you do?

A. I backed up and coupled into it and gave it another kick.

(Testimony of L. E. Mahan.)

Q. Is that second kick the time that Mr. Seamas claims that he was knocked off?

A. After we pulled back up over the 10 track switch in order [292] to put the other cars where they belong, I had to pull back up over No. 10 track switch and he told me that it knocked him off.

Q. All right. Did you kick a second car down against that first car? A. No, sir.

Q. After you saw Mr. Seamas at No. 9 switch when did you next talk to him, or when did he next talk to you?

A. At the time he told me that I knocked him off the car.

Q. Did you see or did he approach you, say anything to you? A. No, sir.

Q. Anywhere here in the vicinity of No. 9?

A. No, sir, he did not.

Q. Pardon me—of this one car anytime during that interval? A. No, sir, he did not.

Q. Didn't say anything to you?

A. No, sir, I didn't see him.

Q. Did you say anything to him?

A. No, sir.

Q. Did you give him permission to get up on either one car or two cars sitting here where they show on the map?

A. No, sir, I did not, and I wouldn't even have let him got up there if I had known it.

Q. If he had asked you for permission to get up and release the brake on the car sitting here at

(Testimony of L. E. Mahan.)

the point marked No. 1 car [293] on an Exhibit 3, would you have given him permission to do it?

A. I would have told that it wouldn't have been necessary because we was already down over the switch where we had to slack ahead anyway and I might as well just kick it in there with the brake on it, if it had one on it.

Q. Why is that so?

A. It is not necessary for a man to have to get up there in that case.

Q. Tell us why it isn't necessary.

A. Well, because I could have got the car in the clear with the brake on it, but it undoubtedly didn't have very much of a brake on it, because I would have noticed it when I pulled—when it pulled by me.

Q. How would you have noticed it?

A. I would have heard the brakes squeaking or probably the wheels sliding if it was on there real tight.

Q. Now, did you give Mr. Seamas any instructions as to what to do after he threw this No. 9 switch?

A. I beg your pardon?

Q. Well, after Mr. Seamas threw this No. 9 switch what were his instructions? What was he supposed to do?

A. Well, he had a list of the other tracks we was going to use over on the other side there. I really don't know which it was, but he went over there, I supposed, to line those switches up. [294]

Q. Did you tell him to do that?

(Testimony of L. E. Mahan.)

A. Well, that is his job. He had the dope—had the switch list there.

Q. As field man, it was his job to do what?

A. When it is possible for him to, yes.

Q. To do what over where?

A. Line up over on the other lead.

Q. By the "other lead" what lead are you referring to?

A. That three and four, five track; that lead.

Q. These other tracks then, three, four, and five, where you were going to put other cars?

A. Yes.

Q. When you made that second kick move to push this car on into No. 9 track, did you know where Mr. Seamas was? A. No, sir, I did not.

Q. Where did you think that he was?

A. I just supposed he was over on the lead there. I didn't dream of him being on the car.

Q. Did you see any light? A. No, sir.

Q. Did you see any reflection of a light?

A. No, sir.

Q. Of a lantern? A. No, sir.

Q. Mr. Mahan, on which side of a cut of cars such as you [295] were working with that night at Stockton, in the Stockton Yards, do you as an engine foreman and switchman usually and customarily work?

A. We all customarily work on the same side, but in this case I suppose he was lining up switches over there.

Q. Which side would the same side be at Stockton Yards? A. South side of the track.

(Testimony of L. E. Mahan.)

Q. What is the purpose in working on the south side of the tracks customarily?

A. Well, everybody see one another and you work with the engineer.

Q. Do you have to pass signals to the engineer?

A. Yes, sir.

Q. Does he have to be able to see you to do that switching work? A. Yes, he can see you.

Q. Under what circumstances, if any, would it be permissible for Mr. Seamas as a switchman to climb on the train on the north side of the track as there at Stockton?

A. Well, it seems to me that a man of his experience should have known what he was going to do and realized he was going to couple into that car and not take the chance.

Q. Well, that is not what I asked you, Mr. Mahan. Is he permitted to climb onto the train on the north side of the cut of cars? [296]

A. I suppose, if he didn't get on the south side.

Q. Sir?

A. If he didn't get on the south side he was bound to have got on on the north side, if he got on.

Q. Is he permitted without permission from you to get on the north side of the cars?

A. Well, not necessarily. He got on there at his own risk.

Q. Did you give him permission to get on?

A. I did not. I didn't tell him to.

Q. Did you know that he was going to get on?

(Testimony of L. E. Mahan.)

A. No, sir.

Q. If you had known that he was climbing on on the other side of the train, on the north side of the train, would your actions have been any different?

A. It would have been all different. I wouldn't have hit it until I had known that he was in a safe place.

Q. You wouldn't have what?

A. I wouldn't hit the car until I knew that he was in a safe place.

Q. By the way, are there any lights in that Mormon Yard? A. Pardon?

Q. Are there any lights in that Mormon Yard?

A. There is one light up there, yes, sir.

Q. Where is it?

A. Right there opposite to where the accident happened. Right [297] there at the switch shanty.

Q. How high is that light?

A. Oh, I imagine it is fifty foot high.

Q. Well, is it a little tiny bulb or a big bulb? Can you tell us about that?

A. It is a pretty good light, makes a nice light up there.

Q. Does it shine for some distance?

A. Sir?

Q. Does it shine for some distance?

A. Well, I would say four or five cars.

Q. Point out to us, Mr. Mahan, if you will please sir, just where that light is.

(Testimony of L. E. Mahan.)

A. Well, it is—I would say fifteen foot west of the switch shanty which is on that map.

Q. Fifteen feet to the west (indicating)?

A. That is right.

Q. Where is it in relation to this No. 10 track?

A. Where is what?

Q. Where is in relation to this No. 10 track? Is it north or south?

A. Oh, No. 10 track. It is south.

Q. How far south?

A. Oh, I would say 15, 20 foot.

Q. Can you tell us what signals you gave to make this move to shove the car on into No. 9 track? [298]

A. Well, when I seen the car didn't go to clear I gave him a back-up signal, easy back-up signal, easy signal to couple into the car. Then I intended to kick it in there as I did when I coupled in.

Q. Did you couple into it? A. Yes, sir.

Q. Then what happened?

A. Well, we kicked it in the clear, No. 9 track.

Q. Did you pull the pin?

A. I didn't. The pin puller did.

Q. How far was he from you when the car—when the cut of cars coupled into the car? How far was the pin puller from you?

A. I walked down to the end of it myself when I seen it didn't go to clear. I walked down to the end of the car and seen that the boy made the coupling and pulled the pin.

Q. How many feet, if you can give it in a matter of feet, was the pin puller from you?

(Testimony of L. E. Mahan.)

A. Well, I suppose 10 foot. I imagine 10 foot.

Q. What signals, if any, were given to the engineer during that move?

A. After I coupled into the car?

Q. No, before you coupled into the car.

A. I give him an easy back-up signal.

Q. Would you mind demonstrating what an easy back-up signal is? [299]

A. (Witness demonstrating): Easy back-up signal.

Q. Now, did you give him any other signal?

A. I gave him—no—I gave him a stop signal, yes.

Q. When did you give him the stop signal?

A. When he got to the car. When he hit the car.

Q. Are you familiar with the rules of the company with respect to how fast you are permitted to couple into a car?

A. Well, you should use judgment coupling into a car and couple into it easy as you can. Of course, sometimes you can't avoid making a rough coupling.

Q. How fast did you couple into this car? How fast were you going?

A. Oh, I would judge between two and a half and three miles an hour.

Q. Did you do any damage to the car?

A. No, sir.

Q. All right, Mr. Mahan. After the accident is supposed to have taken place you talked with Mr. Seamas, you have told us, is that right?

A. Yes, sir.

(Testimony of L. E. Mahan.)

Q. Where were you when you had that conversation with Mr. Seamas?

A. Well, right there where the accident occurred he said, where the car was. He showed me a skinned place on his leg where he said he got knocked off; got a scratch. [300]

Q. Tell me about that skinned place or scratch? What did it look like?

A. Oh, just a minor scratch.

Q. Was it bleeding?

A. No, I don't think so.

Q. Did you see any blood?

A. I didn't see no blood. I don't recall seeing any.

Q. Did you see anything else, or did he show you anything else, any scratches, abrasions, bruises, anything? A. I don't remember if he did.

Q. Did he tell you anything about his back being hurt? A. No, sir.

Q. At any time that evening? A. No, sir.

Q. Did he do any work after this is supposed to have taken place?

A. Well, we worked about—I imagine fifteen, twenty minutes. Then we went and tied in.

Q. Did you notice any difference in his activity after this accident is supposed to have taken place?

A. No, I didn't really—I didn't think his injury amounted to anything and I didn't think nothing of it.

Q. Did you go to the switchman's shanty after you tied up?

(Testimony of L. E. Mahan.)

A. Well, I went down and put my lantern up, yes, sir.

Q. Were you down there with all of the crew?

A. No, sir. [301]

Q. Did Mr. Seamas make any statement to you while you were down there?

A. I don't recall seeing him there at all.

Q. Do you recall any statement that he made about an injury or an accident there?

A. No.

Mr. Cummins: Cross-examination.

Cross-Examination

By Mr. Michael:

Q. Mr. Mahan, you stated there was a light which was located near the shanty?

A. Yes, sir.

Q. That light is there at the present time, isn't that correct?

A. That is right.

Q. And it is also correct that that light was not there at the time that Mr. Seamas was injured, isn't that correct?

A. I wouldn't—I couldn't say.

Q. You don't know? A. I couldn't say.

Q. Then all your testimony a while ago about that light you are not sure of, is that correct?

A. There is a light there now is all that I can say.

Q. There is a light there now?

A. And I couldn't say when it was installed.

(Testimony of L. E. Mahan.)

Q. You don't know whether that light was there on December [302] 9th of last year, do you?

A. Well, I am not sure.

Q. You are not sure? A. No, sir.

Q. Now, is it your testimony that you didn't hear Mr. Seamas tell you at any time not to throw a switch or not to kick those cars?

A. Beg your pardon?

Q. I say, is it your testimony that you didn't hear Mr. Seamas say to you not to throw a switch or not to kick the cars?

A. No, sir, he did not.

Q. Can you hear all right?

A. Well, I can hear, yes.

Q. Don't you have trouble hearing in one of your ears? A. No, sir, I don't.

Q. Do you hear all right in your right ear?

A. Yes, sir.

Q. And you hear all right in your left ear?

A. Yes, sir.

Q. You have never had any impairment of hearing? A. Any what?

Q. Any impairment of hearing?

A. No, sir.

Q. You are quite sure of that? [303]

A. I don't understand the question.

Q. I mean, do you have any trouble hearing out of any ear?

A. Not particularly, no. I have never been turned down with the company.

Q. Now, Mr. Mahan, you stated that the field

(Testimony of L. E. Mahan.)

man should always work in sight of the foreman or the engineer, is that right?

A. That is right.

Mr. Cummins: No, he did not say any such thing.

Mr. Michael: Well, I am sorry.

The Court: You might ask him what he did say. What did you say, Mr. Witness?

The Witness: What?

The Court: Do you hear me now? Counsel asked you—repeat the question, please.

Q. (By Mr. Michael): Mr. Mahan, if I am wrong, please correct me——

The Court: Ask him what he said.

Q. (By Mr. Michael): What did you state with reference as to where the field man should work as far as the engine is located?

A. I stated what?

Q. You spoke of the particular place where the field man should work? A. Well, yes.

Q. Now, would you just repeat that, please? What did you say? [304]

A. Well, his duties is to assist and line up switches as far as he can, and if he is not busy riding cars, setting brakes his duties are to help the foreman line up the switches on the lead and anywhere that might be necessary.

Q. And in this work did you state that he is supposed to work on any particular side of the engine?

(Testimony of L. E. Mahan.)

A. Well, in case he is going to get on cars, that is the only time.

Mr. Cummins: What was that?

(Answer read by the reporter.)

Q. (By Mr. Michael): Mr. Mahan, you stated that the first or the most westerly car on the train was to go into track No. 9, is that correct?

A. That is correct, yes, sir.

Q. And you stated that you kicked one car?

A. One car.

Q. And that this car did not reach track No. 9 but stalled or came to a rest opposite switch stand No. 7? A. That is right.

Q. Then you stated that you gave a back-up signal and the train went into this car?

A. Yes, sir.

Q. And that pushed the car into track No. 9?

A. After I got coupled into it I give her another kick and kicked it in the clear, No. 9. [305]

Q. Then the next move of the train was what?

A. The rest of it?

Q. Yes, where did the train go then?

A. In various tracks, and I can't recall what tracks all they went to.

Q. Do you recall whether the train went in track No. 9? A. Sir?

Q. Isn't it true that after this car or these cars were kicked and they went into track No. 9—

A. Yes.

Q. (Continuing): —that the train then followed those cars into track No. 9?

(Testimony of L. E. Mahan.)

A. No, sir. I had to go back up over the 10 switch again.

Q. And it is your testimony that the train came to a stop here (indicating) and then went back up to the tail track?

A. Up the tail track over 10 switch, that is right.

Q. Do you recall where the various cars were to go on that evening that you had on this train, Mr. Mahan? A. How many cars?

Q. Do you recall where they were to go?

A. No, sir, I can't.

Q. You don't remember? A. No, sir.

Q. You just know that one was to go into No. 9 track? A. I did that. [306]

Q. But they were to go throughout the yard, is that correct? A. That is right.

Q. And who was to align the switches?

A. Well, as far as—if Joe wasn't riding cars, he was supposed to line them.

Q. Do you recall which switches he aligned?

A. No, sir, I can't.

Q. Do you recall in what general area he was working at that time?

A. He was over on the north lead there, I will say four, five, or six switch, up in there somewhere—or maybe three switch, I don't know.

Q. And you don't know, then, what switches he was to check? A. No, sir, I do not.

Q. Then you didn't exactly know where Mr. Seamas was with respect to the field, did you?

(Testimony of L. E. Mahan.)

A. No, I didn't know where he was.

Q. You didn't know whether he was here, whether he was here or whether he was here (indicating), did you?

A. Well, if he had been up there at No. 10 switch, I couldn't have kept from seeing him.

Q. But you didn't know where he was located?

A. No, sir, I didn't.

Q. As far as you were concerned he could have been anywhere in this general area, isn't that correct? [307]

A. I suppose so. I didn't see him.

Q. But you did know he was in the vicinity of the car in the train? A. At what?

Q. You did know he was in the vicinity of the train though, isn't that correct, and the cars?

A. I supposed he was over on the lead probably 30, 40 foot away from the cars.

Q. But you stated you didn't see him?

A. No, sir, I did not until after the accident.

Q. Mr. Mahan, railroad equipment is heavy equipment, isn't it? It is big equipment, isn't it?

A. Sir?

Q. Railroad equipment is big equipment, isn't it? A. Big equipment, yes.

Q. And it is heavy equipment, isn't it?

A. That is right.

Q. And you have been working for a railroad for a long time, haven't you, Mr. Mahan?

A. Quite a while.

(Testimony of L. E. Mahan.)

Q. How many years?

A. Thirty-five actual years.

Q. And how old are you, Mr. Mahan?

A. I am sixty-five years old.

Q. How many different railroads have you worked for? [308]

A. I have worked for three.

Q. Three different railroads? A. Yes, sir.

Q. And you have worked for railroads throughout the United States, haven't you?

A. Well, not over too many states, no.

Q. You have worked for railroads which travel all over the United States? A. Oh, yes.

Q. Now, there is a shanty, isn't there, Mr. Mahan, which is located opposite this switch No. 7?

A. Yes.

Q. Have you been in that shanty very many times? A. Get that what?

Q. Have you been in that shanty very many times? A. Been in it, yes.

Q. Do you know what is inside that shanty?

A. Well, yes, I think I do.

Q. And against one wall there is posted a set of rules about that high (indicating), isn't that correct?

A. No, I don't recall ever seeing them rules in there.

Q. You have never seen a black card about the size of this board and about this wide (indicating) which is right on the wall as you walk out of the

(Testimony of L. E. Mahan.)

shanty and it is white and it has got black letters on it? You have never seen that? [309]

A. No, sir, I never did.

Q. You have never read those rules on that black card, is that correct?

A. I have never seen those rules.

Q. Do you know what this book is, Mr. Mahan?

A. Yes.

Q. What is it? A. That is a rule book.

Q. It is a rule book? A. Yes, sir.

Q. And the rules in this book govern your action, isn't that correct? A. I suppose so.

Q. Now, Mr. Mahan, isn't there a rule in this book which applies not only to the Santa Fe Railroad, but to every railroad to the effect that you—

Mr. Cummins: Objection. The book itself is the best evidence.

The Court: You might ask him about the rule in a general way. You can specify the particular rule that you have in mind.

Q. (By Mr. Michael): Mr. Mahan, I am speaking of Rule 818 and 820a and 820c. Are you acquainted with those rules?

A. I have read them, but I am not too familiar with them right at present. [310]

Q. Would you like to refresh your memory?

A. Yes, sir.

(Counsel hands Rules Book to Witness.)

Q. (By Mr. Michael): Isn't the effect of these rules to state to you in other words that you are

(Testimony of L. A. Mahan.)

not to move that heavy equipment unless you are sure that you can move it without doing injury to any person?

Mr. Cummins: Objection. It does not state the law of the land under the Federal Employees Liability Act. Immaterial, incompetent, and irrelevant.

The Court: Sustain the objection, Counsel. What specifically have you in mind on the rule? What is the text of the rule?

Mr. Michael: The text of the rule, your Honor, is that the train should not be moved.

The Court: Would you read the rule?

Mr. Michael: Yes, your Honor. Rule 818: "During heavy fog, snow, dust storms, or other conditions which impair vision and when signal aspects are not readily discernible it shall be the duty of the engineman, conductors, and engine foreman to regulate the speed of their train or engine sufficiently to insure safety and under these conditions whistle must be frequently sounded. Extra precautions for protection must be taken."

The Court: Does that apply to a switching enterprise or a switching operation? [311]

Mr. Michael: Your Honor, this is in the section under train and yard service, and if I am not mistaken that applies to switching. The other rule, your Honor, is 820.

The Court: Are you familiar with that rule, Mr. Witness?

The Witness: I have read it, yes, sir.

(Testimony of L. A. Mahan.)

Mr. Michael: Would you like to hear Rule 820, your Honor?

The Court: Yes.

Mr. Michael: "In switching cars the following must be observed.

"(a) Warn persons in, on, or about cars, before coupling to or moving them to avoid personal injury or damage to equipment or laden," and

"(c) Cars must not be shoved without first taking proper safeguards to avoid accident."

Mr. Cummins: Your Honor, I am going to object to the reading of these Rules before this jury which is tantamount to placing them in evidence without an opportunity to object to them. I am going to object further on the ground that these Rules are rules of the Santa Fe Railroad to insure safety beyond the rule of ordinary care which the Federal Employers Liability Act lays down as the standard of care for the Santa Fe Railroad to follow, and that we have gone beyond the rule of the statute and attempted by the rules and practices to insure safety, but we have no such standard of care.

The Court: Well, Counsel, you can argue that at an [312] appropriate time. My province now is to rule on the admissibility of the particular rules, and counsel is entitled to examine the witness concerning his knowledge of a particular rule if it has an application to the controversy. Now, the second rule that you referred to, I think has without doubt a bearing upon the particular facts in question. With respect to the first rule referred to, I can't

(Testimony of L. A. Mahan.)

see its immediate application, Counsel. Accordingly, I shall strike the same from the record and the jury is entitled to disregard the same. However, the second rule, I believe, is applicable. I can't see any reason for the blowing of whistles in a situation like this with respect to a switching operation.

Mr. Michael: Well, your Honor, it just speaks of during fog or snow, whenever conditions are such that the vision is impaired. It states that "the movement of the train should be regulated in its speed to insure safety," and then it says, "extra precautions for protection must be taken"; that is the only thing I had in mind.

Mr. Cummins: There is no evidence in this case that vision was impaired. Plaintiff's own witness says that he had two lanterns in sight at all times.

The Court: Yes, I will sustain the objection as to the first rule. The second rule, however, has a direct application. Reference may be made to it, and the witness may be examined thereon. The question inclement weather, if the jury [313] believes it to be inclement, or the fog conditions are circumstances that they may take into consideration in connection with the operations of the switching by this man and his crew. All right.

Mr. Michael: Thank you, your Honor.

The Court: Was your vision impaired on this particular night? Could you see?

The Witness: Yes, sir; it was a light fog, but I could see, oh, I would say 10, 15 car lengths.

(Testimony of L. A. Mahan.)

The Court: Was a lantern visible to you?

The Witness: Yes, sir; oh, yes. There wasn't no chance to take. It wasn't so foggy there was any doubt of any accident.

Mr. Cummins: Will you speak up, please?

The Court: You might examine him on the second rule that you have reference to.

Q. (By Mr. Michael): Mr. Mahan, are you acquainted with that second rule which is 820 a and c? A. I think so.

Q. Do you remember which one I am referring to? I don't want to confuse you. A. 820.

Q. A and c. Mr. Mahan, you stated that you didn't know where Mr. Seamas was; isn't that right? A. That is right; yes, sir.

Q. But you knew he was working in the general area? [314] A. Yes, sir.

Q. As far as you were concerned, he could have been working pretty close to those trains; isn't that right? A. Well, there wasn't no need of it.

Q. Well, wasn't he aligning switches all up and down this lead track?

A. Down that track and I was on the other lead.

Q. Then it could have been possible he could have been right in the vicinity of these cars if you were aligning this switch to this switching (indicating)?

A. I don't know why he would be up there.

Q. If he was going to kick cars from these tracks into the various tracks he would be up here (indicating), wouldn't he?

(Testimony of L. A. Mahan.)

A. I don't know which ones, but——

Q. You don't know which ones?

A. No, sir, I don't recall.

Q. Wouldn't it have been proper under this rule to have determined his position before you kicked that car to find out where he was?

A. No, sir, I wouldn't consider it would be in a switching operation of that nature.

Q. Even though you didn't know where he was?

A. I knew where—I knew where he was supposed to be.

Q. You knew he was supposed to be over there in the general [315] area?

A. He was supposed to be on the lead, lining up.

Q. But you didn't know where?

A. No, sir, I didn't know where.

Q. Mr. Mahan, when you have a train that has some cars on this tail track——

A. Yes, sir.

Q. (Continuing): ——and you have another car located at another section of the track, for example in this particular spot here marked one by track—by track No. 7, and you want to back into that train the first signal you give is a back-up signal to the engineer; isn't that correct?

A. I gave him an easy back-up signal; yes, sir.

Q. Now, isn't it proper as you approach this car here, you give him another signal to slow down?

A. Yes, sir.

Q. And ease in, gradually into this car or these cars; isn't that right?

A. Yes.

Q. And as he approaches this car here (indi-

(Testimony of L. A. Mahan.)

eating), you may even bring him to a stop and then gradually bring him in to couple into the cars?

A. Yes, sir.

Q. You have testified, have you not, that you gave him a back-up signal? [316]

A. That is right.

Q. And you gave him a stop signal?

A. I give him a signal when he got just near the car. He was going, I thought, just a little bit fast.

Q. Did you give him a stop signal before you hit the car or after you hit the car, Mr. Mahan?

A. Before.

Q. Before? A. I am sure, yes.

Q. Did you hear the testimony of the engineer in Court yesterday, Mr. Strain? A. No, sir.

Mr. Michael: No other questions, your Honor.

Redirect Examination

By Mr. Cummins:

Q. Mr. Mahan, if I understood you correctly, during the cross-examination you said it is permissible—rather that you would expect the person to get on on the engineer's side if he was going to get on a car; is that correct?

A. That is right, or notify me otherwise.

Q. If he was not going to get on the car on the engineer's side, he is what—to notify you?

A. Knowing the move I was going to make. He knew I was going to couple into the car.

(Testimony of L. A. Mahan.)

Q. Now, if Mr. Seamas had got on the car for the purpose of releasing the brake on the engineer's side, what route to the [317] brake would he have taken?

A. He would have got up on the east end of the car and walked over the top, as I understand the brake is on the west end, he would have had to walk to the west end of the car.

Q. Would he have been within your sight had he done that? A. Pardon?

Q. Would he have been within your sight—I should say, would his lantern have been within your sight had he done that? A. Yes.

Mr. Cummins: That is all.

Mr. Michael: No further questions.

The Court: One question. Mr. Seamas, the plaintiff, showed you some abrasions or scratches on his legs?

The Witness: Yes, sir.

The Court: Now, when did he show those abrasions?

The Witness: Well, right after the accident, just a few minutes.

The Court: How do you know it was right after the accident?

The Witness: Well, because he was there when we pulled up over that 10 switch, he was out there by where that car was.

The Court: He was out there where the car was?

The Witness: Where that car was that we kicked in No. 9 track.

(Testimony of L. A. Mahan.)

The Court: All right. Now, what did he do? Did he pull [318] up his pants leg and show you?

The Witness: Yes, sir, he did.

The Court: Were his pants ripped?

The Witness: I didn't know, sir.

The Court: And tell me about the abrasions. Describe them for me.

The Witness: The scratch, you mean?

The Court: Yes.

The Witness: Well, I suppose it was somewhere on the leg up here (indicating), probably an inch long, a little scratch; just a small scratch.

The Court: On both legs?

The Witness: No, just one leg.

The Court: What did he say to you when he showed you the scratch?

The Witness: He said, "You knocked me off the car."

The Court: He said to you, "You knocked me off the car"?

The Witness: Yes, sir.

The Court: What did you say to him?

The Witness: Well, I don't recall what I did say to him.

The Court: Well, what did you say? It is important now that you do recall what you said to him.

The Witness: I just didn't say—only I says—I might have said "I am sorry."

The Court: What did you say to him at the time he showed [319] you the scratch?

(Testimony of L. A. Mahan.)

The Witness: Judge, I just remember what——

The Court: Did you say you were sorry?

The Witness: I might have. In fact, I was sorry.

The Court: Why were you sorry?

The Witness: I am sorry if I hurt anybody.

The Court: You have testified that you can't remember any conversation that you had in the shanty?

The Witness: No, sir, I do not, and I don't recall—I don't think he was there. I don't think that I seen him there.

The Court: Did you give a statement to the Company concerning this accident?

The Witness: Yes, sir.

The Court: Do you have a copy of that statement?

Mr. Cummins: It may go in evidence, your Honor. I have a copy of it and I will be happy to read it.

The Court: May I see it before it goes in evidence?

(Counsel hands the Court copy of statement.)

Mr. Cummins: If the Court please, in view of your Honor's questions to this witness, in all fairness I believe your Honor should now read the statement, and I request it.

The Court: I haven't finished reading it, Counsel. When I complete reading it, I will show it to counsel for the plaintiff. Have you examined the statement?

(Testimony of L. A. Mahan.)

Mr. Michael: No, your Honor. [320]

The Court: Will you show this to counsel for the plaintiff and we will take the morning recess. The same admonition to you ladies and gentlemen of the jury not to discuss the case under any conditions or circumstances, not to form an opinion until the matter is finally submitted to you. We will take the recess.

(Short recess.)

Mr. Cummins: Your Honor, it occurred to me that I might possibly have not made a complete disclosure. I have consequently handed counsel the 1428 report made by this witness approximately three days—depending on my memory now—

The Court: I appreciate your being forthright, Counsel, and I will say to the ladies and gentlemen of the jury that in connection with my interrogating any witness thus far or this particular witness, it is not the desire of the Court to create any inference in the minds of the jury that I have a feeling one way or the other about this man's honesty, or his integrity; nor have I any opinion concerning the weight of the evidence, nor his testimony in general. My only thought was—and I believe it to be the duty of the Judge—to elicit the facts which may be obscure in his mind as well as in the jury's mind. In addition to that, to determine whether or not pre-trial procedures have been engaged in. Usually, at a trial of this nature there is an interchange by and between counsel in

(Testimony of L. A. Mahan.)

advance of the trial of all statements given by the employees of a [321] railroad company. That is called a pre-trial procedure. Now, it isn't necessary for me to engage in any discussion with the jury concerning the technique of trying a case, but I merely want a determination in this controversy of any and all statements which may have been taken by either side to the end that there be a full, fair, and complete disclosure of all of the facts.

Now, whether that request be made of the plaintiff or the defendant is of no concern to me, and I certainly did not intend to reflect upon Mr. Cummins or Mr. Baraty, nor upon plaintiff's counsel. My avowed intention was and is merely to have a full, fair and complete disclosure.

Now, so much for that, and I trust the jury understands. As I may have indicated earlier in the case, I think that I asked counsel at one recess to exchange several statements. Mr. Cummins did. He indicated to counsel that he had statements, and I think they examined them. Now, I did not know whether they had seen any statement given by this man. All they have to do in advance of trial is make a demand and the Court will make an appropriate order to that extent. Usually upon demand the railroad counsel supplies statements to plaintiff's counsel without further adieu. I do not intend to try the case for either counsel, defendant or plaintiff. It isn't my province. With respect to the statements, if plaintiff's counsel desire to examine thereon they may do so and they are

(Testimony of L. A. Mahan.)

privileged to do so if [322] they believe any matter is relevant. So far as my offering any statement in the record, I do not intend to do so, because I think I would be transgressing the ordinary province of a trial judge. I think I have made myself clear.

Mr. Michael: Yes, your Honor. Your Honor, in view of that fact that there is a statement made by Mr. Mahan, I will ask the Court for this opportunity to recross-examine Mr. Mahan on that statement.

The Court: All right. You may cross-examine.

Recross-Examination

By Mr. Michael:

Q. Mr. Mahan, do you recall making a statement to J. R. Anderson at—it says Mormon, California, but I guess it means the Mormon Yard in Stockton, on January 3, 1951? A. Yes, sir.

Q. Would you like to refresh your memory on that statement? A. How's that?

Q. Would you like to refresh your memory by reading this statement? A. I think so.

(Counsel hands witness statement.)

Q. (By Mr. Michael): Now, in this statement, Mr. Mahan, you state "field man Seamas"—

Mr. Cummins: Just a moment. If you are going to read the statement I think it should first be identified and offered [323] in evidence, your Honor.

Mr. Michael: I am sorry.

(Testimony of L. A. Mahan.)

The Court: Well, he is entitled to examine with respect to statements made in writing by the defendant heretofore. He need not examine on all of the statement. Counsel on the other side may take up other matters in the light of any developments made here.

Mr. Cummins: Very well.

The Court: Go ahead.

Q. (By Mr. Michael): Mr. Mahan, you state "evidently car had a brake slightly set which did not permit it rolling in the clear." Now, wasn't it your statement a little earlier that if there were a brake on that car you would have noticed it?

A. I said if it was a brake that would amount to anything.

Q. And you feel that a brake which was tightened sufficiently not to permit a car to roll in the clear did not amount to anything?

A. Well, it happened to be an empty car and it doesn't take a very tight brake to slow one of them down.

Q. Now, you state, "field man Seamas was on the opposite side of the cut and I did not see him at any time or did I know that he was injured until about ten minutes after this move was made and we were in the yard office and tied up when he showed me a very slight cut on his leg and did not request any report to be made." [324]

A. Well, he showed me this—that is wrong there.

Q. This is wrong?

(Testimony of L. A. Mahan.)

A. He showed me the scratch up there in the yard, yes, sir.

Q. Then this statement is wrong?

A. Well, that part of it is.

Q. That part of it? You continue, "He made no explanation of how he got the scratch on his leg, made very light of it." Is that correct?

A. He what?

Q. "He made no explanation of how he got the scratch on his leg."

A. Well, he did. He told me that.

Q. And this part of the statement is wrong also?

A. That cut that out.

The Court: What was the answer, please?

The Witness: I said that that part of that statement is wrong because he told me up there in the west end where the accident happened that he got knocked off and scratched his leg.

Q. (By Mr. Michael): "It is the day after accident I learned of the alleged back injury."

A. That is right.

Q. That is correct. The next day you did learn, then, he had hurt his back; is that correct?

A. That is what I was told.

Q. Yes, that is what I mean.

A. Yes, sir. [325]

Q. "I knew none of the details of how alleged accident occurred until January 2, 1951." Is that correct? A. No, sir.

The Court: What was the answer?

The Witness: No, sir, that wasn't correct.

(Testimony of L. A. Mahan.)

The Court: What is incorrect?

The Witness: Incorrect, yes, sir.

Q. (By Mr. Michael): "We came against this car pretty hard, hard enough to knock a man off if he did not have a good hold."

A. That is right, three miles an hour will knock a man off if he hasn't got a good hold.

Q. Wasn't your testimony, a little earlier, that before you ran into this car you gave a stop sign?

A. Well, stop sign and it coupled up, and I judge it hit about two and a half or three miles an hour—stopped probably ten foot away.

Q. Probably ten foot away and then you backed in?

A. Probably so, yes, sir.

Q. "And I had no idea he was on this car when we went against it, and if he was on it I only have his word for it being a fact, and I did not learn he was on it until January 2, 1951."

A. That is wrong. [326]

Q. That is also wrong. "The night was dark, foggy and damp"; is that correct?

A. It was foggy. I could see, though. It was after dark, but it wasn't so dark I couldn't see.

Q. Mr. Mahan, who typed up this statement?

A. I don't know.

Q. You don't recall?

A. Mr. Anderson, I suppose.

Q. Did he type it up in your presence?

A. No.

Q. He did not? A. I don't think so.

Q. Did you read it before you signed it?

(Testimony of L. A. Mahan.)

A. I suppose I did.

Q. You don't recall whether you did or not?

A. Yes, I read it.

Q. And is this your handwriting?

A. Yes, sir.

Q. And your signature? A. Yes, sir.

Q. Where it says, "I have read the above statement and find it correct, L. A. Mahan; witness, J. R. Anderson." Is this statement word for word, a word for word statement that you gave Mr. Anderson?

A. Well, I couldn't recall. I suppose it is. [327]

Mr. Michael: No further questions, your Honor.

Redirect Examination

By Mr. Cummins:

Q. This statement begins, "Statement of L. A. Mahan, made to J. R. Anderson, at Mormon, California." Is that correct or not correct?

A. That is correct.

Q. "On the 3rd day of January, 1951." Is that correct? A. About that time.

Q. "I am 64 years of age and have worked for the Santa Fe Railway Company about nine years, and 13 years on the G.C." Is that correct or incorrect? A. Yes, sir.

Q. "On December 9, 1950, I was foreman in charge of yard engine No. 2351 at time of accident or alleged accident to J. J. Seamas." Is that correct? A. Yes.

(Testimony of L. A. Mahan.)

Q. "We had pulled the rip track and had the rear car of the cut to put into No. 9 track." Is that correct or incorrect? A. Right.

Q. Is this your own interlineation, your own handwriting, here after the word "car": "of the cut to put into No. 9 track"?

A. That is my writing, yes, sir.

Q. "We had kicked this car toward No. 9 and it stopped, so to [328] put it in the clear I had to go against it again with the engine and about six cars to get it in the clear." Is that correct or incorrect? A. That is correct.

Q. You mentioned just one car here, "this car." Did you have one car or more than one car?

A. No, one went to No. 9.

Q. "Evidently car had a brake slightly set which did not permit it rolling in the clear." Is that correct? A. That is correct.

Q. "The pin puller, after we came against the car, pulled the pin"— Is that correct?

A. That is correct.

Q. "I gave a kick sign to the engineer." Did you do that? A. Yes.

Q. "Field man Seamas was on the opposite side of the cut and I did not see him at any time, nor did I know that he was injured until about ten minutes after this move was made"— Is that incorrect? What part of that is incorrect, if any part of it? A. Read the question again?

Q. Yes. "Field man Seamas was on the opposite side of the cut"— Is that correct, you say?

(Testimony of L. A. Mahan.)

A. That is correct.

Q. “——and I did not see him at any time”——
What did you mean [329] by that?

A. At any time after he left No. 9 switch until I talked to him after the accident.

Q. All right. “——or did I know that he was injured until about ten minutes after this move was made”—— Is that correct or incorrect?

A. I won't say. Could vary a little bit, the minutes part.

Q. How many minutes afterward was it that you saw him?

A. Oh, just a few minutes. Not long. I walked back on 10 switch, I think, to where he was.

Q. “——and we were in the yard office”——

A. No, sir, we wasn't in the yard office.

Q. Did you go to the yard office?

A. We went to the yard office, but afterwards.

Q. “——and tied up, when he showed me a very slight cut on his leg”—— Is that correct, he showed you a very slight cut on his leg?

A. He showed me that up at the east end of the yard.

Q. Did he show that to you again at the yard office?

A. No, I did not see him at the yard office.

Q. “——and did not request any report to be made and did not complain of any back injury.” Did he? A. No.

Q. “The scratch on his leg was the only complaint.” Is that [330] true or false?

(Testimony of L. E. Mahan.)

A. That is true.

Q. "He made no explanation of how he got the scratch on his leg." Is that true or false?

A. True.

Q. What did he tell you?

A. That is all he told me, said he got knocked off the car, and showed me a scratch.

Q. "——made very light of it"—— What did you mean by that?

A. Well, I didn't think much of it. Didn't think it amounted to anything.

Q. "——and the scratch appeared to me to be of such a minor nature and so inconsequential that I thought it would not require a report"—— Is that correct or incorrect? A. That is right.

Q. "——and as the man did not complain about a back injury, no matter how slight, and had no other complaints, I did not make out any reports for three days." Is that correct or incorrect?

A. That is correct.

Q. "It was the day after accident I learned of the alleged back injury." Is that correct?

A. That is correct.

Q. "I knew none of the details of how alleged accident occurred until January 22, 1951." Is that correct or incorrect? [331]

A. That is incorrect.

Q. Why is that incorrect and how is that incorrect?

A. I knew of the accident at the time it happened; that is, right afterwards.

(Testimony of L. E. Mahan.)

Q. Did you know the details of it?

A. All I knew, he said he got knocked off the car, is all.

Q. Did you learn more details later?

A. No, sir.

Q. From anybody? A. No.

Q. "——when Seamas came to me, wanted me to sign a lot of papers,"—— What about that? What happened? A. That is the reason——

Q. What happened there?

A. He came over to my house, and he said someone wanted me to sign some papers.

Q. What happened? Did you sign them?

A. No, I couldn't afford to sign them.

Q. Why didn't you sign it?

A. I didn't think I had a right to sign it.

Q. Did you read what he wanted you to sign?

A. No, he didn't offer to let me read it.

Q. He didn't offer to let you read it?

A. No.

Q. "——had another man with him"—— Do you know who that was? [332]

A. No.

Q. Was it one of these gentlemen?

A. No.

Q. Mr. Patterson? A. No, sir.

Q. "——and at that time told me got hurt by falling or getting knocked off the car——." Did he tell you that? A. What?

Q. When he came to see you that day, January 3rd, did he tell you about being knocked off a car?

(Testimony of L. E. Mahan.)

A. Yes.

Q. Talk to you about it? A. Yes.

Q. Get any more details at that time?

A. No, sir.

Q. “——when we came against it to knock it in the clear. We came against this car pretty hard, hard enough to knock a man off if he did not have a good hold but I had not told Seamas to get on this car to release a brake——.” Is that all true?

A. Yes.

Q. “——and did not expect him to——,” is that true or false? A. True.

Q. “——as I was going to put it in the clear on the kick I was making.” Is that correct?

A. Yes. [333]

Q. “Seamas had no business on the opposite side from where the signals and work were being given and handled.” Is that true? Is that correct or incorrect?

A. Didn't have no business getting on those cars over there.

Q. Why is that so?

A. Because I wouldn't know, unless he notified me, he was going to go there. If I see him, I would have to look out.

Q. “I do not know what he was doing out of place, which he is most of the time——” I am not going to ask you anything about that, sir “——and I had no idea he was on this car when we went against it, and if he was on it, I only have his word for it being a fact, and I did not learn he was on

(Testimony of L. E. Mahan.)

it until January 2, 1951, when Seamas made the statement in my house in the presence of some person unknown to me." Is that correct or incorrect?

A. Part is and part isn't.

Q. Tell me which part is? A. All right.

Q. "I do not know what he was doing out of place——" Is that correct or not? A. Yes.

Q. "——which he is most of the time——" Not going to ask you about that. "——as I had no idea he was on this car when we went against it." Is that correct? A. That is right. [334]

Q. "——and if he was on it, I only have his word for it being a fact——," is that correct?

A. That is right.

Q. "——and I did not learn he was on it until January 2, 1951——" Is that right or wrong?

A. I learned about it the night it happened.

Q. "——when Seamas made the statement in my house in the presence of some person unknown to me. The night was dark, foggy and damp." That is correct, is it? A. Yes.

Q. "The brake was on the west end of the car and we came against the east end of the car, kicking it west." Is that right? A. That is right.

Q. "Seamas had an electric lantern but there was no indication of a light on the brake platform of the car when we came against it." Correct or not?

A. I was unable to see the brake platform because it was on the west end of the car and I was on the east end of the car.

(Testimony of L. E. Mahan.)

Q. Did you see any light? A. No.

Q. Did you see any reflection of a light in the foggy weather? A. No.

Q. "——as far as I could see, and I was about a car length away when the move was made." Is that all true? [335]

A. Well, no, I was right there, close, but I won't say how far. Maybe ten or fifteen feet.

Q. All right, that is the entire statement. Now, Mr. Mahan, on December 16, 1950, you wrote a report in your own handwriting, didn't you?

A. Yes, sir.

Q. That is it, is it? (Handing document to the witness.) A. Yes, sir.

Q. Anybody assist you in making that report? Is that your report, sir? A. Yes.

Q. Is it in your own handwriting?

A. Yes.

Q. Did anyone help you make that report?

A. No, sir.

Q. Where did you make it out?

A. At the yard office.

Q. Anybody with you? A. No, sir.

Q. By yourself? A. By myself.

Mr. Cummins: I offer this report in evidence, your Honor.

Mr. Papas: Your Honor please, I cannot understand the purpose of this report. I think it is compounding the evidence already. If it is for the purpose of impeaching the [336] witness——

Mr. Cummins: I will be glad to state what the

(Testimony of L. E. Mahan.)

purpose is. In view of your Honor's remarks, the kind of remarks and the manner in which your Honor made the remark, in spite of the fact that your Honor has told the jury to have no intention of indicating how the Court felt, I think it is important, that this report is a very highly important document.

The Court: Counsel, for the purpose of clarification, and so I may understand your statement, what did you mean by the manner in which I made the statements?

Mr. Cummins: Your Honor cross-examined this witness, with all due respect to the Court, I felt your Honor cross-examined this witness rather harshly.

The Court: He is a bit hard of hearing, which is quite evident to the Court, any information or added emphasis I may have given was directed to that extent, and not for the purpose of cross-examining the man. I am trying to elicit truth. I may have a little emphatic way of speaking. I think I have. That is not concerned with my attitude toward an individual; and if by an over-emphasis, or if by an endeavor on my part to have my questions understood, I indicated that I was cross-examining this man, I want that to be entirely eliminated from the minds of the jurors.

Mr. Cummins: Thank you, your Honor.

The Court: I did not intend to cross-examine him in [337] that sense. I intended to elicit information. I do suppose I examined rather emphati-

(Testimony of L. E. Mahan.)

cally at times for the avowed purpose of being understood.

This court room from the acoustical consideration is improperly constructed. That is a matter of engineering, not of legalistics. During the course of the Bridges case, where I participated a few months, we could not hear the witnesses and I had to get this equipment and we have had it ever since. It is difficult to hear witnesses, and it is difficult to hear counsel at times. You may recall I asked you at the very threshold if you couldn't raise your voice.

Mr. Cummins: Yes, your Honor.

The Court: I did not intend to reflect upon this man. He admits he made the statement, admits there are certain corrections he wanted to make in the statement. He has made the corrections. That is the extent of it. The credibility is for the jurors. Whether they believe the man fell off the car, whether they believe the man was injured, that is your problem; and in interrogating this gentleman, I did so to the end that you would have a full, fair and complete exposition of the facts. The decision of a case is sometimes difficult. I sometimes feel that I am aided and assisted by a jury. Do I clarify myself, counsel?

Mr. Cummins: Yes, your Honor. I had only this purpose, to do my duty to my clients of saving an exception, which I would [338] like noted on the record.

(Testimony of L. E. Mahan.)

The Court: Yes.

Mr. Cummins: In view of what transpired, and I feel it is incumbent on me as attorney for the defendant to make as complete and full a disclosure of which I am capable, and in view of just convincing that the man was not correct, that he was informed by anyone, I ask that this statement in his own handwriting go in evidence.

The Court: May I see it?

Mr. Cummins: Yes, your Honor. (Handing document to the Court.)

Mr. Papas: There is no evidence in this case that he was informed by anyone, as counsel states.

The Court: In addition, I might add that not only is the hearing of a witness most difficult in this court room, but in addition you can't see. So I have an added thought. I had to have that equipment installed to the end that I not go around with a miner's light on the bench.

For the purpose indicated, Mr. Cummins, the statement may be received and marked in evidence on behalf of the defendant.

(Statement of L. A. Mahan, December 16, 1950, was received in evidence and marked Defendant's Exhibit No. D.)

The Court: Is the other statement in [339] evidence?

Mr. Cummins: I want to offer it, your Honor.

The Court: It may be marked appropriately as defendant's exhibit next in order.

(Testimony of L. E. Mahan.)

(Statement of L. A. Mahan, dated January 3, 1951, was received in evidence and marked Defendant's Exhibit E.)

Mr. Cummins: At this time, if I am capable of doing so, may I read the statement? I don't know whether I can make it out or not.

"Form 1428 Standard Report, Santa Fe."

Mr. Mahan, no reflection on your writing, and I am sure I write worse than anybody else in the court room, but what is that (handing document to the witness)? A. "Coast," looks like.

Mr. Cummins: "Name of injured person, J. J. Seamas. Residence, Stockton. Occupation, Switchman. If married, name and residence of husband or wife." That is filled in "Yes." Names and ages of children, "Don't know." If employee, how long in service of this company? "Since 1937." "Under whose direction was he working at the moment of accident? L. A. Mahan. If passenger, where from?" Then that is filled in with an "X." The next one, two, three, are marked with "X's." They aren't filled in.

Question No. 11: "State fully nature and extent of injuries. He showed me his leg that night"—

Q. What is this, Mr. Mahan? [340]

A. "He showed me his leg that night—" I can't read my own writing.

Q. That is "small"?

A. "Skinned place," I guess it is. Yes.

Mr. Cummins: "He showed me his leg that

(Testimony of L. E. Mahan.)

night, small skinned place, but he claims he got knocked off of car and now his back is hurt.

“12. What was done with or for him, and by whose direction? Nothing as did not think injury was enough to mention.

“13. Name and address of surgeon. None.

“14. Number of cars in train. 25.

“Number of cars airbraked. None.

“Date of accident. December 9th, about 9:00 p.m.

“Nearest station, Mormon. Mile post 11-22.

“If night, was headlight burning? Yes.

“Kind of weather, Fog, snow or ice. Clear.

“On main or side track? Side track.

“Curve or straight? Straight.

“Up or down grade? Level.”

Q (By Mr. Cummins): Is that right? Can you tell us what that is, Mr. Mahan?

A. Yes, that is “Level.”

Q. “Up or down grade, Level?”

A. Yes. [341]

Mr. Cummins: “Number of train, YL”——

A. Yard.

Mr. Cummins: “Engine 2351. Direction bound, Yards. Speed five miles per hour.

“Conductor, yardmaster or foreman, L. A. Mahan.

“Engineer, B. Marrs. Fireman, Strain.

“Brakeman, Switchman or other employees: J. J. Seamas and S. A. Weith.

“If foot caught in switch or frog, was switch or

(Testimony of L. E. Mahan.)

frog provided with safety blocks, and what kind? No."

Then there are some "X's."

"Extent of injured person's acquaintance with road at and in the vicinity of the place of accident. Yes.

"Was there any rough handling of cars or engine? No.

"Was injured party attending strictly to his duties? Yes. Were the surroundings such as to afford him a safe place to work? Yes.

"Was ground or floor clear of obstructions? Yes.

"Was view of trainman or injured person obstructed? Yes.

"If so, by what? He was on opposite side from me and did not know he was on car."

The next thing filled in was:

"Was bell ringing or whistle sounded before accident? No."

Pardon me, there is one up here: [342]

"Was there any defect in track, bridges, rolling stock, machinery, tools or other appliances, which caused this accident? If so, explain fully, giving initials and numbers of any defective cars, and so on. No.

"Did you witness accident? No."

Q. (By Mr. Cummins): What is the purpose, Mr. Mahan, of having some of these questions marked "X"?

A. Well, they wasn't involved in this accident.

(Testimony of L. E. Mahan.)

Q. "Was bell ringing or whistle sounded before accident? No.

"Did you witness accident? No.

"State your location with reference to point of accident, and tell what you were doing. Kicked this car to No. 9, and it had a brake on it and did not go to clear and had to couple in to it and give it another kick.

"Did injured person say anything to you, or anyone else, about accident after injury? If so, what? He said he got his leg skinned and that was all. Kept on working and I did not think the injury was anything to speak of.

"In whose hearing was it said? Helper Weith.

"Give names, occupation and post office address of all persons not already mentioned who witnessed the accident."

That is filled in, "None."

The next thing is: "Give full particulars. J. J. Seamas claimed he got hurt, but he was on off side and I did [343] not see accident.

"Sign here"— And Mr. Mahan's signature, and "Occupation, Engine Foreman." Dated, December 16, 1950.

That is all the questions I have of this witness.

Recross-Examination

By Mr. Michael:

Q. Mr. Mahan, do you wish to make any corrections in this statement at this time?

(Testimony of L. E. Mahan.)

Mr. Cummins: Well, that is an indefinite question.

A. No.

Mr. Cummins: I think the witness is entitled to have a little bit more information.

The Court: Yes. You might ask him specifically.

Q. (By Mr. Michael): Mr. Mahan, you state in your statement that was just read that the track was straight, is that correct?

A. Describe what?

Q. The track was straight.

A. Yes, it was straight lead there, right where the car was going at No. 9.

Q. Is that straight or isn't that a curve that blends into the lead?

A. The car was located at No. 7 switch, which would be almost straight, and up until I got into No. 9.

Q. You state you had 25 cars on the train?

A. Well, there must be some mistake about that, somehow.

Q. There must be some mistake about [344] that? A. Yes.

Q. You state the weather was clear?

A. The weather was—I could see. They say it was foggy, but I don't recollect it being too foggy. I could see good.

Q. Was it foggy or was it clear, Mr. Mahan?

A. I couldn't—they tell me it was foggy, I have heard, but at that time I could see quite a ways.

(Testimony of L. E. Mahan.)

Q. You state that the speed of the train was five miles per hour. Is that correct?

A. Speed of the train five miles per hour? Well, I don't know. I just made a guess at that.

Q. That is a guess?

A. That is just—five miles per hour? I could have been going that fast, but I don't think so.

Q. Do you recall the time when this last statement was made? I don't believe it is dated, your Honor.

A. When the statement was made, sir?

Q. Excuse me, it is.

The Court: December 16th.

Q. (By Mr. Michael): December 16th, I am sorry. This statement was made December 16, 1950, isn't that correct? A. I guess it is.

Q. And this statement was made January 3, 1951? A. Yes, sir. [345]

Mr. Michael: No further questions, your Honor.

The Court: The witness is excused. Thank you.

(Witness excused.)

Mr. Cummins: I would like, your Honor, to call Mr. Wilson back to the stand to clarify something.

NEIL WILSON

recalled as a witness for the defendant, previously sworn.

The Clerk: You have heretofore been sworn and you are still under oath. Please take the stand.

(Testimony of Neil Wilson.)

Direct Examination

By Mr. Cummins:

Q. Mr. Wilson, to remind the jury, you are still a trainmaster for the Santa Fe Railway Company at Stockton? A. Yes.

Q. Are you a principal officer in Stockton representing the Santa Fe?

A. I am the principal officer in Stockton representing the Santa Fe between Fresno and Richmond, yes, sir.

Q. All right. Now, can you tell us whether or not there were, in December, 1950, any lights in the Mormon Yard?

A. Yes, sir, Mr. Cummins. We have had at the switch shanty where this alleged accident occurred, we have a switch shanty and it has a pole, and has a light about, oh, I would say 15 or 20 feet up, with a reflector on the back of the light so as to throw the light down the lead in the vicinity [346] of 10, 9, 8 and this 7.

Q. How long has it been there, Mr. Wilson?

A. Well, the definite date? I couldn't say, but I have been around Mormon and on this Division for 15 years and I know it has been there at least two or three years.

I might add that the pole—we have a pole for a flood light which is a considerable height, but the flood light has not been installed, but the light half way up the pole has been there for some time.

(Testimony of Neil Wilson.)

Q. All right, sir. Do you have any duties in connection with the rules of the company?

A. Yes, sir, I examine employees on the rules and interpret the rules as to their meaning to employees when they are employed as well as to the employees after they come up for promotion.

Q. Did you ever examine Mr. Seamas on the rules?

A. Well, I am satisfied that he was examined. I couldn't say definitely whether he worked at Bakersfield or Stockton, but one trainmaster on the Santa Fe Railroad examines all employees before they enter service, and further, we have a road examiner that comes over the road and re-examines the men on the book rules frequently to keep them before their eyes, yes, sir.

Q. I show you Rule 820 in the rule book, Mr. Wilson. Can you tell us whether or not in your instructions—can you tell us [347] whether or not in your experience on the railroad it has any application whatever to a switch move?

A. Mr. Cummins, Rule 820(a) says: "In switching cars the following must be observed: Warn persons in, on, or about cars before coupling to or moving them to avoid personal injury or damage to equipment or lading."

That refers to switching cars where cars are picked up in the yard at various points and broken out on the lead and segregated as to destinations, points they are intended for, eastward movement or westward movement.

(Testimony of Neil Wilson.)

And 820(a) says: "Warn persons in, on, or about cars before coupling to or moving them to avoid personal injury or damage to equipment or lading."

That refers to a switchman, if he is going to switch some cars into a house track——

Q. Just a minute. What is a house track?

A. A house track is where they unload merchandise cars. When a switchman comes up against that track, he must first determine whether there is any boards in the cars for men to be unloading the cars, or an automobile is picked up, which would foul the kick. In other words, he is to see and determine whether it is safe to shove his cars in before he makes the move, Mr. Cummins. That Rule 820(a) applies to switching cars, not train cars.

Q. Does that have any application to the sort of thing that [348] occurred December 9th, where you have a field man instructed to go over and line the switch and make a kick move down to the track?

A. Mr. Cummins, a switch move in the yard—— which I have had 41 years experience in various yards, switch job, you handle the cars——it doesn't have any bearing to the particular move made in this case. This was made in accordance with all rules and safety of operations.

Q. Is there any other rule there that has application to the situation? That is, Rule 820, any subdivision that has application to the situation we are now concerned with?

A. 820(b) says: "Where engines may be working at both ends of a track, or tracks"——

(Testimony of Neil Wilson.)

Q. That wouldn't be it.

A. That wouldn't be it.

Q. 820(c) ?

A. That says: "Cars containing livestock must not be kicked or dropped, when avoidable." That doesn't apply.

Q. I was thinking about 820(c) was the one mentioned. Let me see that. 820(c): "Cars must not be shoved without taking proper safeguards to avoid accidents. Slack must be stretched to test couplings."

A. That means that cars must not be shoved without first taking the proper safeguards to avoid accidents. Well, in all our yards, the big terminals, we have switch engines [349] working at both ends of the yards. One engine on the west end may be breaking up a cut of cars, segregating as to destinations. We have another engine working at the east end doing likewise.

Our instructions to all employees, not to shove the cut of cars up blind. We mean without some employee on the end of that signaling so that we don't shove through the track and sideswipe or cause a collision with the other engine. That rule refers to cars without first taking safeguard to avoid accident.

It says, "Slack must be stretched to test couplings." You should stretch it to see that all couplings are made, because if you start with a coupling wasn't made, the cars could roll clear to the yard and cause an accident.

(Testimony of Neil Wilson.)

Q. What is Rule 813?

A. Rule 813 states: "When obedience to signals on part of engine man is essential to the safety of an employee in the performance of his duty he must know that the signals have been seen, understood and obeyed, before placing himself in a dangerous position."

"When a movement for which signal has been given is incomplete, or not clearly understood, or the person giving the signal, or the light with which signal is given, disappears from view, engineman must stop immediately and sound signal 14(j)." Fourteen (j) means four toots of the whistle. [350]

Q. All right. What does that signal mean—what does that rule mean, rather, in reference to a move such as being made to push the cut or the car west from the tail track down No. 9 track, or kick it?

A. Well, if you are a member of a switch crew and walking down alongside the cars, and if the lights should disappear between the cars, the engineer must immediately stop because his signals—he don't know where that man is or what he is up to. That is a safety move we have for protection of an employee.

Q. If the engineer has one light in view is he permitted to move the train?

A. One light is his indication of the signal that he can accept, yes.

Q. I am going to ask you about yourself. On what side of the train at Stockton does the switch-

(Testimony of Neil Wilson.)

man and engineer usually and customarily work?

A. Mr. Cummins, we use diesel switch engines at Stockton, diesel electric. The fireman is on the diesel merely to give signals or catch signals or to observe the position of cars on the side of the track. But we have to give signal directions to the engineer. We work on the engineer's side because you throw a signal to the fireman he would have to relay the signal over to the engine man, which would cause delay, slow yard movement, and for that reason we always work on the [351] engineer's side, in switching cars, and that is standard all over the Santa Fe Railroad.

Q. Does that tie in in any way with Rule 813?

A. It isn't applicable, Mr. Cummins, as to Rule 813.

Q. Under what circumstances, if any, is it permissible for a switchman to board a train or cut of cars on the north side of the train, or the fireman's side of the train?

A. Well, at Stockton, Mr. Cummins, we have a location—you have the picture on the blackboard—face a slight grade from east to the west—which we call north or south, but it is east and west. Right up on the east lead we have more or less of a slight sag or level-off spot in the yard. The engine foreman in switching cars in that location will kick the cars into any of the tracks. After they clear the leader track, or where all the tracks join, the car will roll down out of the way so that he can let some more cars go in the same track.

(Testimony of Neil Wilson.)

Q. Apparently I didn't make my question clear to you, Mr. Wilson. Under what circumstances, if any, is it permissible for a switchman to board a cut of cars or a car on the north side of the track, or on the north side of the train or cut of cars?

A. Ordinarily the switchman would work on the engineer's side, but if he should be down in, say, No. 2 switch on the diagram, and cars would roll down No. 6, he could cross over [352] and set a hand brake on the car and bring it to a rest. But ordinarily the foreman would expect his helpers to be on the side which he is operating and then he knows what their position is at all times.

Q. Would it be permissible for him, under the rules or custom to get on a train that was being worked in the yard, or a cut of cars that were being moved, or about to be moved, if he knew that?

A. Wouldn't be a rule for safety, the man place himself in a position where he could get on without the knowledge of his foreman, who is responsible for the safety of his helpers.

Q. Would it be permissible if he got permission from the engine foreman?

A. If he did secure permission from the engine foreman, the engine foreman then would be in a position to know where he was located, and handle the work accordingly.

Mr. Cummins: Cross-examine.

The Court: We might take a recess, ladies and gentlemen. I had no opportunity to discuss this matter with counsel, but I have had a matter set

(Testimony of Neil Wilson.)

this afternoon of some importance, and under the circumstances we will adjourn this case until tomorrow morning at 10:00 o'clock, at which time further examination of this gentleman may be taken up by counsel for the plaintiff. I assume this completes the evidentiary aspect of the case? [353]

Mr. Cummins: Yes, your Honor, it does.

Mr. Papas: Yes, your Honor.

The Court: Counsel for both sides may argue the case, the Court will instruct you, and the matter will be submitted to you tomorrow, Friday, for decision. We will adjourn this case until tomorrow morning at 10:00 o'clock. Same admonition.

(Whereupon, an adjournment was taken to Friday, October 5, 1951, at the hour of 10:00 o'clock a.m.) [354]

October 5, 1951—10:00 A.M.

The Clerk: Seamas versus Sante Fe Railway Company, on trial.

Mr. Papas: Your Honor, may we at this time enter into a stipulation by and between respective counsel in connection with the life expectancy of the plaintiff in this matter?

The Court: Yes.

Mr. Papas: Your Honor, according to the Commissioner's 1941 standard ordinary mortality table, the average life expectancy of a person aged 37 is 31.75 per cent. Is it so stipulated, counsel?

Mr. Cummins: Yes, so stipulated.

The Court: So ordered.

NEIL WILSON

resumed the stand, previously sworn.

Cross-Examination

(Continued)

By Mr. Papas:

Q. Mr. Wilson, just a couple of questions, please.

A. Yes, sir.

Q. Would you be good enough to tell us do you live in Fresno or in Stockton?

A. Sir, I live in Stockton and my office is in Fresno, and I have jurisdiction on the railroad between Fresno and [355] Richmond.

Q. I see. Where is your office in Stockton?

A. My office is up over the Stockton depot where the passenger station is.

Q. That is at San Joaquin Street and Taylor, I believe? A. Correct.

Q. Do you have occasion to go out to the Mormon yard?

A. Sir, I have occasion to supervise the railroad between Fresno and Richmond, and I am in numerous places; not only Stockton, but Riverbank, Pittsburg, and Antioch. Wherever the Sante Fe service requires my supervision.

Q. By that you mean that you travel all over these different yards, is that correct?

A. Yes, sir, that is correct.

Q. Mr. Wilson, I take it that you are aware Mr. Mahan has been working for the Sante Fe Railroad for a number of years?

(Testimony of Neil Wilson.)

A. Yes, sir, he testified here yesterday, if I recall.

Q. We don't care what he testified to. We are asking you whether or not you know from your own knowledge, sir, whether he has been working for the Sante Fe Railroad for a number of years.

A. I know he has been at Stockton for a number of years, yes, sir.

Q. How long, if you know, has he been a foreman?

A. He has been an engine foreman ever since I came to the [356] Valley Division which is probably 15 years that I have been on this territory, and he was engine foreman at the time I arrived here.

Q. I see. And he has worked at the Mormon yard for quite some time, has he not?

A. Yes, sir, he has been an engine foreman and worked in Mormon yard, also Stockton yard, and also the Port of Stockton.

Q. And I take it, Mr. Wilson, that he has had occasion to use this track known as the back lead track and the lead track and the tail track for quite a period of time, hasn't he?

A. Yes, sir, he uses that very frequently. During his tour of duty he is required to switch cars to these particular locations, yes, sir.

Q. And I take it, Mr. Wilson, that you travel Fresno, Riverbank, Hanford, Stockton, Richmond, and as you say, wherever the Santa Fe in that area has a division?

(Testimony of Neil Wilson.)

A. With the exclusion of Hanford. I don't go any further east than Fresno.

Q. Can you tell us, sir, how is it that you remember there was a light near the shanty when Mr. Mahan, who has been working for the Sante Fe and Stockton as foreman for approximately 15 years and has used this track time and time again, doesn't even remember whether it was there on December 9th?

A. Sir, I looked up the records, and on August of 1949 the authority was granted for the installation of this light at [357] that location, sir.

Q. I see, but the authority was granted, but you didn't know from your own knowledge whether or not that light was there at that time, do you?

A. Sir, I testified here that I was not definite the exact date, and I am not, sir.

Q. And you don't know whether it was there on December 9th, 10th, or the 11th?

A. I wouldn't specify December 9. I said I was not sure when the light—but the authority from the Sante Fe Railroad to install the light was issued August, 1949.

Q. I see. Now, Mr. Wilson, are you acquainted with Mr. Archibald in Stockton?

A. Yes, sir, I am acquainted with Mr. Archibald and any other railroad man under my jurisdiction. I personally make it a point to be acquainted with them, sir.

Q. Sir, is it not true that Mr. Archibald is a rules examiner for the Sante Fe Railroad?

(Testimony of Neil Wilson.)

A. No, sir, I am the rules examiner on the Santa Fe Railroad between Fresno and Richmond. I examine all the employees from train service, yard service and engine service on the operating rules of our company.

Q. Now yesterday you stated, Mr. Wilson, that it is the practice of the various employees of the railroad to work on the side where the engineer's side is, is that correct? [358] A. Yes, sir.

Q. And now you stated that on this particular track or switch yard it is customary to work on the south side, is that correct?

A. Yes, sir, when the engine is pointed east they would have to work on the south side so they would be in position to pass signals to the engineer, that is right, sir.

Q. Well now, Mr. Wilson, we have track switches designated on this board, do we not.

A. Yes, sir.

Q. It is occasionally necessary for a switchman to go over there to manipulate those switches, is it not? A. Yes, sir, that is his duty.

Q. And if it is his duty he obviously has to go on that side of the track, doesn't he?

A. If he is lining up like in this particular case it has been testified he had five or six cars and in a switch yard none of these cars as a rule is destined to the same location. Therefore, we have different tracks designated in the yard for cars destined to the Western Pacific, destined to Southern Pacific, destined to Richmond, and it is the field man's

(Testimony of Neil Wilson.)

responsibility after he secures a tab from his engine foreman where these cars are to be separated, it is the field man's responsibility to go over on that side and line up the switches so the engine foreman can make the moves. [359]

Q. Mr. Wilson, may I ask you, sir, that you as an expert, and I take it that you were placed on the witness stand for the purpose of testifying as an expert?

A. I consider myself as an expert in switching and railroad operation or I wouldn't have the present position.

Q. You have been a yardmaster or a trainmaster for about 15 years, haven't you?

A. I couldn't give you the exact date. However, I have been an employee of the Santa Fe Railroad for 41 years, sir.

Q. You certainly must know, it is important to you, it is an important job, you certainly must know how long you have been a trainmaster.

A. I was promoted to a trainmaster in 1935, I believe, sir.

Q. Well, that is what I wanted to know. And I take it that you haven't done any switching of cars since you have become a trainmaster have you?

A. I beg to differ with you, sir. During the war I not only was a switchman, but a yardmaster. I was a brakeman and I was a fireman and I was a call boy and anything that required my services during the war I participated in.

Q. You know everything about railroads.

(Testimony of Neil Wilson.)

Mr. Cummins: Well now, that is argumentative.

The Court: Yes, that is.

Mr. Papas: I will withdraw that, your Honor.

Q. Well now, I was about to ask you, Mr. Wilson, if you were [360] line up track switch No. 9 and then the switch list indicated that you had to line up track switch No. 2 or 3, whatever it is, 4, 5 and 6, wouldn't it be logical and reasonable for you to walk from track No. 9 to track No. 3 and then walk back towards track No. 6 and the No. 10 switch?

A. Not in a switching move, sir. If the first car into this cut is destined for 9 track, the field man would drop off and line No. 9 track switch. Then if the next car was destined for No. 4 track he would walk down the lead and line No. 4 track switch, and when the engine foreman kicked the car into 9, it would be the engine foreman's duty to reverse the switch and be ready to make the next move down the lead where the cars are destined.

Q. Didn't you state a moment ago that it is the job of the employees to do as much as possible on the south side of this track?

A. Yes, sir, that is the rule. That is where he should be unless he has other duties which have been given him by his engine foreman which he should perform because he is a helper for his engine foreman to expedite the switching of cars, sir.

Q. Isn't it logical, then, for him to work from this position towards the No. 10 track switch so that eventually he can get over on the south side?

(Testimony of Neil Wilson.)

A. He wouldn't work towards the engine, he would work away from the engine, sir, if the cars was going down the lead. He [361] would be of no benefit to the engine foreman. He could line the switch.

Q. In other words, your statement then is that Mr. Seamas should have worked in this direction (indicating) ?

A. Yes, sir, if he lined No. 9 switch and his tab which I am not familiar with where the next car was destined—I don't know what cars he had hold of or where they were going, but you stated that if it was No. 4 he should line No. 9, walk down the leads toward No. 4 and line that switch.

Q. That is what I am asking you, sir. In other words, he would walk from 9 over to 4 or 3, wouldn't he?

A. Yes, he would line up the switches down the lead where the cars are destined.

Q. Yes, he would line No. 3, he would go over to 4 and 5 and 6, wouldn't he?

A. He could come down the lead. You are going up the lead.

Q. Up or down, whatever you call it.

A. That is the proper method in switching box-cars, sir.

Q. Very well. Yesterday you testified that as far as you were concerned, all these moves and this particular move that involves us here was made according to all safety regulations and practices, is that correct?

(Testimony of Neil Wilson.)

A. Well, I wouldn't say, sir, because if you wish me to tell you I can tell you.

Q. Didn't you say yesterday that you felt it was your opinion [362] that it was made with all the safety that was possible?

A. Well, if an employee gets up on the blind side of a car without the knowledge of the engine foreman and for no reason whatever, I wouldn't consider it safety on his part.

Q. Excuse me, sir, that is not my question. I asked you whether or not you stated yesterday, whether it was your opinion yesterday that this particular move was made with all the safety that was required.

A. As far as the engine foreman is concerned, as far as the operation of the engine, that part, but the unsafe part about it was the man getting up on the blind side.

Q. You are not answering my question, sir.

A. Well, I have tried to, sir. You asked me if the move was safe and I told you that I don't consider it safe.

Q. I am asking you if yesterday when you testified for Mr. Cummins you stated that this particular move, as far as you were concerned, was made with all the safety regulations that were required?

A. Well, as far as the engine foreman's move and as far as the car to be kicked into No. 9 is concerned, that certainly is in accordance with all the rules of safety and everything; but as far as

(Testimony of Neil Wilson.)

me following through, I am not able to do that, and I am not going to.

Q. You don't know whether it was made with all the safety regulations or not, do you? [363]

A. Well, as far as the cars pulled off the rip track are concerned, as far as the engine foreman giving the instructions to his switchmen as to their positions and what to do, that part of it was absolutely safe as the Santa Fe knows how to make it, sir.

Q. Well, you don't know if it was safe on this particular occasion, do you? You weren't there.

A. No, you asked me if I thought it was safe. I am not testifying that I was there. I am just stating merely that as far as I know the rule the movement was safe.

Q. In other words, you have been sitting in this court room for four or five days and after hearing the evidence it is your opinion that it was made with all the safety regulations, is that right?

A. Up to a certain point, sir, but I don't say that all the movement was safe.

Q. Very well. Now, in connection with this rule 820A in which you state—which reads as follows:

“In switching cars the following must be observed. A. Warn persons in, on or about cars before coupling to or moving them to avoid personal injury or damage to equipment or lading.”

You stated that that applies only to house tracks?

(Testimony of Neil Wilson.)

A. Well, sir, it does not apply to that switching move because we would never get any cars switched or we would never [364] move any trains if we walked down, and that applies to a switchman when he is going into a warehouse track or any track where he is in doubt as to whether automobiles or trucks or bridges across the cars are involved, he must not shove that track until he warns persons, warns vehicles to avoid injury to person or property damage. But that doesn't apply to switching, sir, in any way.

Q. Does it apply to the yard service?

A. It applies to yard engines, but not yard service. It applies just what I stated, at those particular locations.

Q. What is the heading on this bold type, Mr. Wilson? What does that say?

A. That says, "Train and yard service."

Q. And then section 820 says:

"In switching cars the following must be observed." It doesn't say that it applies to the house track alone or to areas where cars are going to be taken for the purposes of loading or unloading, does it?

A. Well, in switching service, that interpreted by me and instructed to all switchmen, a switchman doesn't misinterpret that meaning of that rule. He knows where it applies. It applies to where I stated, sir.

Q. In other words, this is your opinion to the interpretation of this rule?

(Testimony of Neil Wilson.)

A. That is the interpretation of the rule all employees have [365] in yard service who have been examined by me by the book of rules, sir.

Mr. Papas: No further questions.

Mr. Cummins: Nothing further.

Your Honor, I have only one thing further, and I have been informed that I misread one item on this 1428 report. I would like to call the jury's attention to the item No. 14. I am told that there is a number scratched out there and it should read 5 instead of 25 cars.

Mr. Papas: May we see that a moment?

Mr. Cummins: Yes, you sure may.

Mr. Papas: Your Honor, we are going to definitely object to that. The document speaks for itself and if his Honor may look at it, there is nothing to indicate that it was scratched out. It says 25 cars here. There is nothing to indicate there was any scratching out. He admitted yesterday that he had it on here, it was his handwriting. We submit it to his Honor for inspection. There was no omission at all.

Mr. Cummins: No one has testified here about 25 cars.

The Court: "Number of cars in train 25." That appears in the face of the report.

Mr. Cummins: Your Honor, "2" was stricken out. That is what I have been informed.

Mr. Papas: Well, I mean, your Honor, that is what counsel has been informed but the record speaks for itself. [366]

Mr. Cummins: Let the document speak for itself.

The Court: What may be interpreted according to the document in the light of any testimony in the record. Is that the case now?

Mr. Cummins: Yes, your Honor.

The Court: The matter is submitted on the evidence?

Mr. Papas: Yes, your Honor.

The Court: You may now argue the [366A] matter.

[Title of District Court and Cause.]

INSTRUCTIONS TO THE JURY

Monday, October 8, 1951

The Clerk: Seamas versus Santa Fe Railway Company, on trial.

The Court: Ladies and gentlemen of the jury, it is now the duty of the Court to instruct you as to the law of this case. When you were impanelled a week ago as jurors, I then advised you that you were the sole arbiters of the facts; that is, it is your exclusive province to find the facts in this case and to pass upon the credibility of all witnesses, and it is the Court's duty to instruct you as to the law. That is my exclusive province, and you must accept the Court's statements as to legal principles.

So that you may understand the processes, counsel for the plaintiff proposes instructions as to the law from his viewpoint; counsel for the defendant

then presents instructions from his viewpoint, and the Court attempts to refine their reasoning into principles and state the law as the Court believes it to exist.

This type of case does not present any very unusual principles of law because the basic statutes are found in the United States Code, and I will advert to them during the course of my instructions. And as I further will advert, this type of case is distinguished from the so-called workmen's compensation case, for in this type of controversy the plaintiff must [367] establish negligence on the part of defendant company before he can recover, notwithstanding you may have views to the contrary.

The recess period over the week end probably gave you an interval of time to look upon the facts objectively. Sometimes a respite can help not only a jury but also a court, and I feel that in the light of the legal principles which I have announced to you, a refinement of the facts should not be, perhaps, as difficult as the problem might have been had you gone into your deliberations late Friday afternoon.

With respect to the admissions in the case, it is admitted by the defendant in this case that the defendant was a carrier, being a railroad engaged in interstate commerce, and that the plaintiff was employed by the defendant in interstate commerce, and that the injuries, if any, sustained by the plaintiff, arose in the course of his employment while engaged in such commerce. Now, that admission between counsel created by the pleadings may be accepted by you as final. In short, the plaintiff was

injured while actually engaged in the course of his employment.

There is one other preliminary matter, and that is the filing of a complaint. As you know, or at least should know by this time, the complaint is not evidence in the case. The complaint is merely the framework, as in constructing a building, the superstructure of a case, then the evidence is [368] placed like bricks upon the superstructure. But the pleading is not evidence. It is merely a charge that must be substantiated by competent legal evidence.

In this case there was an amended complaint filed, based upon an affidavit which counsel referred to during the course of his argument, I think, counsel for the Santa Fe. And the fact that the complaint was amended and that an additional request was made for some \$75,000 should not control you in any manner in arriving at your verdict, if you do arrive at a verdict. The plaintiff may ask for any amount he feels justified. But the question of providing damages, as in the proof of negligence, rests upon the plaintiff, and he must establish to your satisfaction—that is, he must discharge the burden of proof as to the damage aspect.

Now, the plaintiff at the time and place of the accident having been engaged in the conduct of interstate commerce, the statutes of the State of California governing employers' liability and workmen's compensation are not applicable to this case, and plaintiff's right to recover, if any, is based on statutes of the United States Government covering the liability of carriers, railroads, to their employees

for injury sustained while in the course of their employment. Statements of counsel in their arguments are not evidence in the case, unless statements are made as admissions or stipulations concerning the existence of a fact or facts [369] during the trial of the case. I indicated to you the admissions by stipulation with respect to the employment aspects.

I further charge you that in arriving at a verdict you are not to consider as evidence anything that has been stricken by the Court, or anything offered to be propounded or contained in any question to which an objection has been sustained by the Court.

If I made any statement during the course of this trial which seemed to you to reflect upon counsel or any of the witnesses, or seemed to you to indicate that the Court had any opinion upon the merits of the case or upon some fact or issue involved therein, then I direct you to disregard any such statement in reaching a verdict in this case.

In your consideration and determination of this controversy, you must treat it as a litigation between persons of equal standing in the community. Your determination should not be affected in any way by reason of the fact that the defendant is a corporation, nor should you be in any way influenced one way or the other by any thoughts or ideas you may have as to the financial standing of any party to this litigation. This case is to be considered and determined by you just as you would consider and determine any litigation between two private individuals.

The defendant corporation can act only through its servants, agents and employees; and so far as this case is [370] concerned, if there is no negligence on the part of any servant, agent or employee of the defendant it will be your duty to render a verdict in favor of the railroad company.

It has been established, or at least evidence was introduced, that at the time of the accident in question Mr. Marrs, Mr. Strain, Mr. Weith, and Mr. Mahan were the employees of the defendant, Atchison, Topeka and Santa Fe Railroad Company, and were, at the time of the events out of which the accident occurred, within the scope of their authority; hence, the alleged acts and omissions of these employees were, in contemplation of law, the acts and omissions, respectively, of their employer, the defendant, Atchison, Topeka and Santa Fe Railroad Company.

Thus, if Mr. Marrs, Mr. Strain, Mr. Weith or Mr. Mahan were negligent, their negligence, if any, is imputed to the defendant Santa Fe Railroad Company.

When a foreman gives an employee an order, either expressly or by implication, the employee has a right to assume, in the absence of warning or notice to the contrary, that he would not thereby be subjected to injury.

In this case, a civil case, the affirmative of the issues must be proved, and the affirmative here is upon the plaintiff as to the affirmative allegations of the complaint. Upon the plaintiff, therefore, rests the burden of proof of such allegations. [371]

A portion of the Federal Employers' Liability Act in effect at the time of this accident reads as follows:

“Every common carrier by railroad shall be liable in damages to any person suffering injuries while he is employed by such carrier for such injury resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, or other equipment.”

I further charge you that the railroad company does not insure or guarantee its employees against the possibility of accident. Its duty is to exercise ordinary care. Insofar as it performs that duty, it fulfills the law and incurs no liability for accidental injury. Inherent in the nature of a railroad business are certain hazards, but even such dangers do not make the company an insurer or change the rule of liability that I have stated, although, in the exercise of ordinary care, the amount of caution required increases as does the danger that is known or that reasonably should be apprehended in the situation.

You are the sole judges of the weight of the evidence and the sufficiency thereof, and the credibility of all witnesses. In determining the credibility of a witness, you [372] should consider whether his testimony is in itself contradictory, whether the statements made by such witness are reasonable or unreasonable, whether they are consistent with his

other statements or with facts established by other evidence, or admitted facts.

You may also consider the witness' manner of testifying on examination, the character of his testimony, the bias or prejudice, if any, manifested by the witness, his interest or absence of interest in the suit, his recollection, whether good or bad, clear or indistinct, concerning the facts testified to, his information or motives, together with the opportunity of the witness knowing the facts whereof he may speak. And having thus considered all of the matters, you must fix the weight and value of the testimony of each and every witness, and of the evidence as a whole.

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed, and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that [373] be great or slight, and you may reject it if, in your judgment, the reasons given for it are unsound.

You are not bound to decide in accordance with the testimony of any number of witnesses against a less number, or against a presumption or other

evidence satisfying your minds. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact in a civil case.

In civil cases a preponderance of evidence is all that is required, and the burden rests upon the plaintiff to prove his case by a preponderance of the evidence before he is entitled to a verdict. By a preponderance of evidence is meant such evidence as, when weighed with that opposed to it, has more convincing force.

Preponderance of evidence means not the greater number of witnesses, but the greater weight, quality and convincing effect of the evidence, and proof offered by the party holding the affirmative as compared with the opposing evidence.

In an action of this character both direct and circumstantial evidence are admissible, and any fact in this case may be proved by either direct or circumstantial evidence or by both. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. Circumstantial evidence or indirect evidence is that which, though true, does not of itself conclusively establish that fact, but which affords [374] an inference or presumption of its existence.

A presumption is declared to be a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the

jury is bound to find in accordance with the presumption.

An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a deduction from those facts as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

I instruct you that a witness is presumed to speak the truth. This presumption may be repelled, however, by the manner in which he testifies, by the character of his testimony, by his motives, or by contradictory evidence. Where the evidence is contradictory, your decision must be in accordance with the preponderance thereof. It is your duty, however, if possible, to reconcile such contradictions so as to make the evidence reveal the truth.

When the evidence in your judgment is so equally balanced in weight and quality, effect and value, that the scales of proof hang even, your verdict should be against the [375] party upon whom rests the burden of proof.

If any witness examined before you has wilfully sworn falsely as to any material matter, you may disregard his entire testimony; that is, being convinced that a witness has stated what is untrue, not as the result of a mistake or inadvertence, but wilfully and with a design to deceive, you must treat all of such witness' testimony with distrust and suspicion and reject it all, unless you shall be

convinced that the witness in other particulars has sworn to the truth.

Negligence is defined as the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do. In other words, it is the failure to use ordinary care in the management of one's person or property.

There is no legal presumption of negligence. Negligence is a fact which, like other facts alleged by the plaintiff, must first be proved.

Proximate cause has been defined and must be understood to be that which in the natural and continuous sequence, unbroken by effective intervening causes, produces the injury and without which the injury would not have occurred.

I have just instructed you as to what constitutes proximate cause of a happening of an accident. In this connection you are further instructed that under the federal employers' liability act the employee need not prove, in order [376] to recover, that the negligence of the defendant or its servants was the sole proximate cause of his injuries. Under the law the railroad is liable for injury to its employees, even if its negligence is only a contributing proximate cause. It is only where the railroad's negligent act is no part of the causation that the defendant is free from liability.

I charge you that in this case the defendant railroad company was required to use ordinary care, by which is meant the degree of care that would

be used by a person of ordinary prudence under the same or similar circumstances.

I further charge you that although custom is not a substitute for ordinary care, a failure to observe custom may be evidence of negligence; but the standard, which is due care, is not fixed by custom or altered by its presence or absence; what others do is some evidence of what should be done, and custom may assist in the determination of what constitutes ordinary care.

Reference has been made to contributory negligence, allegedly as on the part of the plaintiff. Contributory negligence in this case is such an act or admission on the part of the plaintiff amounting to want of ordinary care in the circumstances as, cooperating or concurring with a negligent act of the defendant, if any, was a proximate cause of any injury complained of.

I must remind you of the fact that the [377] effective contributory negligence in a plaintiff's claim is different in a case brought under the federal law herein involved from what it is in the usual action for damages based on alleged negligence and brought under the state law. In the latter type of action where the state laws are controlling, contributory negligence by a person usually is a bar to any recovery by him. But in an action such as we are now trying wherein the federal law controls, contributory negligence, if any existed, does not entirely bar recovery, but does require a proportional reduction of damages that otherwise would be recoverable.

Under the law governing this case the question of whether or not the plaintiff's negligence contributed to his injury is a question to be determined by you as members of the jury from the evidence now before you. If such negligence of plaintiff exists in conjunction with the negligence of the employer, then the damages to be allowed must be proportioned between the plaintiff and the defendant according to their respective fractions of the total negligence. If, however, you find that negligence exists only upon the part of the plaintiff and none on the part of the defendant, you cannot award any damages to the plaintiff.

In considering the issue of contributory negligence it is your duty to consider all of the evidence which has been introduced in this case. [378]

Ladies and gentlemen, if you find that the plaintiff is entitled to recover, you may then award him such damages, within the amount claimed, as in your opinion will compensate him for the pecuniary damages proved to have been sustained by him and proximately caused by the wrong complained of.

In estimating the amount of such damage, you may consider the physical and mental pain suffered, if any; the extent, degree and character of suffering, mental or physical, if any; its duration and its severity, and the loss of time and the value thereof, and loss of earning capacity. You may also consider whether the injury was temporary in its nature or is permanent in its character, and from all these elements you will resolve what sum will

fairly compensate the plaintiff for the injury sustained.

If you find that the plaintiff is entitled to recover, the nature of his recovery is what is denominated compensatory damages; that is, such sum as will compensate him for the injury which he has sustained.

While the law says recovery may be had for mental suffering, it means a recovery for something more than that form of mental suffering described as physical pain. It includes the numerous forms which physical and mental suffering may take, which will vary in each case with the nervous temperament of the individual, his ability to stand shock, the nature of his injuries, whether permanent or temporary. [379] Mental worry, distress, grief, mortification, where they are shown to exist, are proper component elements of mental suffering of that type for which the law entitled the individual to monetary redress.

I have instructed you on the measure of damages. However, you are not to assume from the fact that you have been instructed on the measure of damages, and the Court by so instructing you does not intend to convey the idea to you, or to tell you, that you should award damages to the plaintiff. You have been instructed on the measure of damages not because the Court feels one way or the other in this case as to whether or not the plaintiff should recover, but because the Court, in cases such as this, instructs on all of the issues of the controversy.

The mortality table was referred to during the course of the trial, and it was indicated that the expectancy of life of one aged 37 years is 31.75 years. This fact, of which the Court takes judicial notice, is now in evidence to be considered by you in arriving at the amount of damages, if you find that plaintiff is entitled to a verdict. However, the restricted significance of this evidence should be noted. Life expectancy shown by the mortality tables is merely an estimate of the probable average remaining length of life of all persons in our country of a given age, and that estimate is based on not a complete, but only a limited record of experience. [380] Therefore, the inference that may be drawn from the tables applies only to one who has the average health and exposure to danger of people of that age. Thus, in connection with this evidence, you should consider all other evidence bearing on the same issue, such as that pertaining to the occupation, health, habits and activity of the person whose life expectancy is in question.

In attempting to ascertain the amount of damages you find plaintiff may be entitled to by reason of loss of earnings, you may consider the mortality table which has been referred to and the length of his expectancy. However, you must utilize such table or tables as a general guide only. There are numerous other facts that you must keep in mind. Some of these are the general state of plaintiff's health at the time of the accident, the nature of his occupation, and the hazards attached to such occupation; reasonable expectations as to increase

or decrease of earnings with the passage of years. You should further consider the extent of plaintiff's disability, and the likelihood of plaintiff being able to obtain employment which will permit him to earn a part or all of his former salary. In fixing your award, if any, you are to agree upon such sum as will be the substantial equivalent of the lost earnings.

If you find in favor of the plaintiff, then I instruct you that in fixing the damages you can make allowance only [381] for such elements as have been proved with reasonable certainty.

You can allow nothing for elements of damage which are speculative or conjectural. As to future detriment, you can allow only for that which the evidence shows with reasonable certainty is likely to follow. If as to any claimed element of damages or detriment there is such uncertainty that you cannot determine that such element exists or that the claimed detriment is reasonably certain to result in the future, then to the extent of such uncertainty the plaintiff has failed to sustain the burden of proof, and such uncertainty must be resolved against him and in favor of the defendant, and any claimed element of damage past, present or future as to which such uncertainty exists must be eliminated from your considerations, and must be eliminated as an element to be compensated for.

If you should decide to return a verdict for plaintiff, and if you should find that as a result of the accident in question he has suffered a loss

of earning capacity that will affect his future earnings, you will be guided by these rules:

1. If loss of earning capacity is not total, you must make due allowance for anything the plaintiff is reasonably earning in the future either in his former line of work or in any other.

2. Even if you should find the loss of earning capacity [382] to be permanent, it would be improper to use the full life expectancy of the plaintiff as a basis for calculations, if his expectancy as a wage or salary earner is shorter. If the earnings expectancy is the shorter, that is the expectancy to use.

3. If the impairment of earning capacity is not permanent, then the computation must be based on only that period for which the temporary lack of capacity is reasonably certain to continue.

4. After finding in dollars and cents what the future effect on plaintiff's earnings is reasonably certain to be, you then must find the present value of such sum, and award only that present value for that particular element of damage. In doing this you will calculate on the basis that any sum you might award will be handled and invested with reasonable wisdom and frugality, and that all of it, except as currently and reasonably needed, will be kept so invested as to yield the highest rate of interest consistent with current interest rates and reasonable security. The present value will be a sum which, when supplemented by such income from it, will equal the total of such future loss.

I have about completed the instructions, ladies and gentlemen; and in concluding, I desire to admonish you that it is your duty as jurors to consult with one another and to deliberate with a view to reaching a verdict, if you can do so [383] without violence to your individual judgment.

To each of you I say that you must decide the case for yourself, but you should do so only after a consideration of the case with your fellow jurors; and you should not hesitate to change an opinion when convinced that it is erroneous. However, none of you should vote for either party, nor be influenced in so voting, for the single reason that a majority of the jurors are in favor of such party. In other words, you should not surrender your honest conviction concerning the effect or weight of evidence for the mere purpose of returning a verdict, or solely because of the opinion of the other jurors.

If you find from the evidence that the plaintiff is entitled to a verdict, you must not, in ascertaining the amount, resort to the pooling plan or scheme which has sometimes been adopted by juries in fixing such amounts. That plan or scheme is where each juror writes the amount to which he or she considers the plaintiff is entitled and the amounts so written are added together. This is a scheme of chance, and no element of chance may enter into your verdict, or enter into the determination of any question in respect thereto.

The clerk of court has prepared several forms of verdict for your convenience, and solely for your

convenience. One form of verdict has the title of the court and cause: *Seamas versus Atchison, Topeka and Santa Fe Railway Company*, [384] No. 30360. We, the jury find in favor of the plaintiff and assess damages against the defendant in the sum of blank dollars. Line for the signature of the foreman.

The other form of verdict, same title of court and cause. Verdict: We, the jury, find in favor of the defendant. Line for signature of foreman.

Upon your retiring to the jury room you will select one of your number as a foreman or forelady who will preside over your deliberations, and who will sign the verdict to which you may agree. It is necessary in these courts that twelve jurors agree upon a verdict. As soon as twelve of your number have agreed upon a verdict, you should have it signed by your foreman or forelady and then return with it to this courtroom.

Are there any exceptions or objections or omissions, counsel? If you have, they must be made in the absence of the jury.

Mr. Cummins: Yes, your Honor.

The Court: Will they be very lengthy?

Mr. Cummins: No, very brief.

The Court: You may make them in chambers, then. I shall ask the jurors to remain here briefly.

Ladies and gentlemen, under the law counsel on both sides are entitled to present at this juncture any exceptions they may have to my charge to you to the end that in the event the matter is reviewed

hereafter by any court an exception may be [385] made in the record.

We will take this opportunity of conferring with counsel in chambers, and the jury is admonished not to leave the courtroom, and not to discuss this matter until I finally charge you.

(The following proceedings were had in court chambers outside the presence of the jury:)

The Court: You might make your exception, counsel.

Mr. Cummins: Yes, sir. They are two in number. One is right at the beginning, your Honor, you were talking about the pleadings and admissions in the pleadings, and in them you told the jury that there are admissions in the pleadings that plaintiff was injured while engaged in interstate commerce. I don't believe that the answer admits an injury took place, or even that an accident took place. It is probably just one of those pro forma things.

The Court: Wasn't it admitted by stipulation in open court, counsel?

Mr. Cummins: That the accident, if any did occur, was in interstate commerce. In other words, the interstate commerce character of the commerce was admitted, but the fact that an injury——

The Court: I will correct that if you wish. I will say to the jury that the Court should submit a correction to the extent that it is admitted that the plaintiff was engaged at [386] the time in question in interstate commerce and in the course of his employment; however, it is denied that an in-

jury took place. I think that is a fair correction.

Mr. Cummins: Plaintiff's instruction No. 23 reads:

“When a foreman gives an employee an order, either expressly or by implication, the employee has a right to assume in the absence of warning or notice to the contrary, that he would not thereby be subjected to injury.”

I believe that instruction is erroneous for the reason that what it does is to tell the jury that the employer, under the federal act, insures the safety of the employee; and for the further reason that the law is that an employee could abide by the general rule of conduct on the part of the defendant, that is, he may anticipate the defendant will exercise ordinary care toward him, and that provisos and condition is not included in the instruction.

The Court: All right, your exception is noted. Do you have any, counsel?

Mr. Papas: No, your Honor.

Mr. Baraty: Judge, I note when you gave them the portion of the Employers' Liability Act, you mentioned the clause that reads “Defective Equipment,” and that isn't an issue in this case.

The Court: Well, I think the jury has been fully [387] instructed on the question of negligence, and we withdrew the instruction as to safe place to work. I will make the one correction.

(The following proceedings were had in the courtroom in the presence of the jury.)

The Court: Ladies and gentlemen of the jury, there is one correction on the part of the Court. Mr. Cummins has directed my attention to a possible oversight, that although the defendant railway company admits that the plaintiff, Mr. Seamas, was engaged in the course of his employment at the time and place in question; and although the defendant railway company admits that he was engaged in interstate commerce, the defendant denies in the pleadings as well as during the course of the trial that the plaintiff was injured in the manner alleged.

With that correction, you may retire to the jury room for your deliberations, and the Clerk will send you the file and all exhibits after counsel on both sides have had an opportunity to examine the exhibits to the end that we not have any extraneous matter or foreign matter in the file folder. You may take with you all exhibits, and the Marshal will take you to a safe and convenient place for your deliberations. You may now retire.

(Thereupon at 9:45 a.m. the jury retired from the courtroom.) [388]

(At 10:35 a.m. the following proceedings were had:)

The Court: I have a request from the jury for the testimony of Mr. Mahan. I think we had better read the testimony in court. Where is counsel for the other side?

The jury has requested the testimony of Mr. Mahan. I believe both the jury and Court and

counsel will be better served if we read that testimony in open court rather than send the transcript to the jury. Is there a transcript available of Mr. Mahan's testimony?

Mr. Cummins: We do not have it with us, your Honor.

The Court: Do you have that, Mr. Reporter?

The Reporter: We have a copy of it in the office, your Honor.

The Court: I will ask you to get it and I will be available.

(At 11:10 a.m. the Court, counsel and the jury returned to the courtroom and the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, you have asked for a review of the testimony of Mr. Mahan, and accordingly the Court has obtained through the medium of the reporter a transcript, and it may be read to you by question and answer.

Specifically, you direct attention to a portion of Mahan's testimony in regard to Mr. Seamas' authority to go on the car to check the brakes. Counsel have endeavored to narrow [389] the transcript to the particular issue, but I think it is rather difficult to do so and we may have to take and run through the full testimony, direct and cross-examination.

Mr. Reporter, will you read the same, please?

(Thereupon a portion of the testimony of Mr. Mahan was read to the jury by the court reporter.)

The Foreman: Your Honor, I think that covers the point we had in mind. Is that a correct statement, ladies and gentlemen:

The Jury: Yes.

The Court: All right, the jurors may retire for further deliberations.

(Thereupon, at 11:50 a.m., the jury retired from the courtroom.)

(The jury returned to the courtroom at 4:14 p.m., and the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, your foreman has indicated that he would like to make a report to the Court looking toward your deliberations and the possibility of additional deliberations on your part.

The jury now has been in session for the greater part of the day, including the interval of the luncheon, during which you had a respite, and the matter being a civil case, you have given considerable time and energy toward a solution.

Mr. Foreman, may I ask you several questions—and I [390] do so with the consent of counsel. I have had a conference with them in chambers. May I ask you how you stand numerically, without indicating in whose favor?

The Foreman: Ten to two, your Honor.

The Court: Do you feel, Mr. Foreman, in the light of the problem involved, the specific problem that may be involved, and in the light of the deliberations you have just said you had, that additional

time might solve the problem and put an end to your deliberations?

The Foreman: Your Honor, we have approximately the same number as shortly after our conference, we will say.

The Court: Have you stuck at that figure approximately throughout?

The Foreman: Yes, we have. We have had five votes in all, with numerous discussions back and forth with all members participating and everyone giving their viewpoints. It has not changed the actual outcome of the vote at any time, and it has been from that time on, approximately ten o'clock until now.

The Court: I need not repeat to you, ladies and gentlemen, that these cases are expensive in the trial. Expense, of course, is not a matter in the administration of justice and should not be considered in arriving at a verdict or a decision. But at the same time the realities of a situation must be considered.

The cost in these cases is one that is assumed by the [391] United States Government. You people pay the price. You people pay for the operations of this court. You pay my salary. You pay the attaches' salaries. These courts are operated for the people, and traditionally we have sought to maintain a very high standard in the administration of justice.

A deadlocked jury, if this be a deadlocked jury, would result inevitably in a new trial. The case will have to proceed again, and a new jury impanelled,

the process gone through again, witnesses produced.

When I say that the cost ultimately falls to the government, I mean by that the cost of jurors, fees, witness fees, and so on, and the jury's fees. However, there is additional cost. The railroad company is required to maintain counsel, and equally the plaintiff has entailed cost, witness fees, doctors and the like.

So all in all, if there is a possibility of arriving at a verdict—and I don't mean a forced verdict where a person's sincere judgment must be forsaken, but I mean if there is a possibility of arriving at a true and just verdict in the case, it is my recommendation to you to return for further deliberations.

However, it is not my province to coerce you in any manner, because I do not believe that a coerced verdict is a verdict at all in either a civil case or a criminal case. I [392] mean by that one where a court keeps a jury out interminably until finally, by sheer exhaustion, one or two jurors will capitulate. I do not subscribe to that, and I can't countenance it as being a part of our judicial system.

But I do feel, however, if further deliberations might aid and assist you in any way whatsoever in an approach to your problem, that you should avail yourself of that opportunity. If, however, you feel that it would be a purposeless mission and task on your part, I believe that your foreman might now advise me. If the jurors desire to return for brief deliberations in the light of my remarks, you may do so. Mr. Foreman, what is your pleasure?

The Foreman: Your Honor, I think if we could

adjourn for some more deliberations I think it would be wise to try again, although we haven't had much success in the last six hours.

The Court: In the light of my remarks you might sit down and have a further discussion. I do admonish you, however, it is not my purpose to in any wise coerce any juror or jurors. It is not my purpose to in any way, emotionally or otherwise, sway your honest judgment if it be an honest judgment on the facts. However, if it be a stubborn viewpoint borne only from a whim or caprice or reason not found in the evidence, then I think in the interests of justice and fair play and common decency that a position of that kind should [393] be forsaken.

It is difficult, if not impossible, for either a juror or court to pry into a person's mind; and at the very heart of our jury system lies independent judgment and independent thinking, and I for one feel that so long as we can preserve that independent thinking and thought, just so long shall our system of jurisprudence survive.

I have sat in these courts now for six years, having come from the state court, and I look upon my experience with juries as one of the great experiences of my life. I have found juries here dispensing justice in extremely difficult cases. I have found them reaching verdicts that I knew were hard to reach, that would have been hard for me to reach, and I can say only the greatest praise for the cross section of the people as I find them here. You peo-

ple come in here from all walks of life, all creeds, all colors and all denominations. And it is your duty, equally with the Court and equally with counsel and the agencies of the court throughout, to maintain our jury system intact and decent and honorable.

So with those thoughts you might return, and without my reiterating, I do not intend in any wise to attempt to persuade or coerce, but merely to indicate your solemn responsibility.

You may retire for further deliberations.

(Thereupon, at 4:20 p.m., the jury retired from the court [394] room.)

(At 6:10 p.m. the jury returned to the court room and the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, have you arrived at a verdict?

The Foreman: Yes, your Honor, we have reached a verdict.

The Court: Mr. Marshal, will you accept the verdict, please? Mr. Clerk, will you read the verdict?

The Clerk: Ladies and gentlemen of the jury, hearken to your verdict as it shall stand recorded:

“We the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of \$22,500.

“Signed Jerome A. Starr, Foreman.”

So say you all?

The Court: Poll the jury, please.

(The jury was polled by the clerk.)

The Clerk: Your Honor please, the verdict stands unanimous.

The Court: The verdict may be noted and judgment entered thereon, and appropriate stay granted.

Mr. Cummins: May I have thirty days, your Honor?

The Court: Thirty days.

Ladies and gentlemen of the jury, I realize that this has [395] not been an easy case for you, and I quite realize the perplexities that probably confronted you in the case, involving as it did medical testimony as well as narrative testimony of witnesses. I desire to thank you for your zeal and devotion to your duty, and you are discharged now until further notice.

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ KENNETH J. PECK.

[Endorsed]: Filed Jan. 29, 1952. [395-A]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in the above-entitled case and that they constitute the record on appeal as designated by the attorneys for the appellant herein:

Complaint for personal injuries.

Answer.

Demand for jury trial.

Notice of motion and motion to amend complaint.

Order granting motion for leave to amend complaint.

Amended complaint.

Answer to amended complaint.

“Rule 820.”

Verdict.

Judgment on verdict.

Motion for new trial.

Order denying motion for new trial.

Order granting stay of execution.

Notice of appeal.

Supersedeas bond.

Notice of filing bond on appeal.

Praecipe for transcript of record.

Designation of contents of record on appeal.

Deposition of Dr. C. A. Luckey.

Deposition of Joseph J. Seamas.

6 volumes of Reporter's transcript.

Plaintiff's Exhibits 1 to 7 (3 for identification, omitted).

Defendant's Exhibits A to E.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 29th day of January, 1952.

C. W. CALBREATH,
Clerk.

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13246. United States Court of Appeals for the Ninth Circuit. The Atchison, Topeka and Santa Fe Railway Company, a Corporation, Appellant, vs. Joseph J. Seamas, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 29, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13246

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation,

Appellant,

vs.

JOSEPH J. SEAMAS,

Appellee.

STATEMENT OF POINTS

Statement of points on which appellant intends to rely:

1. Excessive damages appearing to have been given under the influence of passion or prejudice.
2. Erroneous instruction of the jury.
3. Error in law occurring at the trial and excepted to by appellant.
4. Irregularity in the proceedings of the court and abuse of discretion by which appellant was prevented from having a fair trial.
5. Insufficiency of evidence to justify the verdict and the amount of damages awarded.

Dated February 13, 1952.

ROBERT W. WALKER,
J. H. CUMMINS,
PEART, BARATY &
HASSARD,

By /s/ J. H. CUMMINS,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 14, 1952.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD
TO BE PRINTED

1. All of the evidence introduced at the time of trial and transcribed by the Court Reporter.
2. All written exhibits.
3. All stipulations of the parties.
4. All orders, rulings and judgments of the court.
5. All pleadings.
6. All instructions requested and all instructions given by the court.

Dated February 13, 1952.

ROBERT W. WALKER,
J. H. CUMMINS,
PEART, BARATY &
HASSARD,

By /s/ J. H. CUMMINS,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 19, 1952.

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